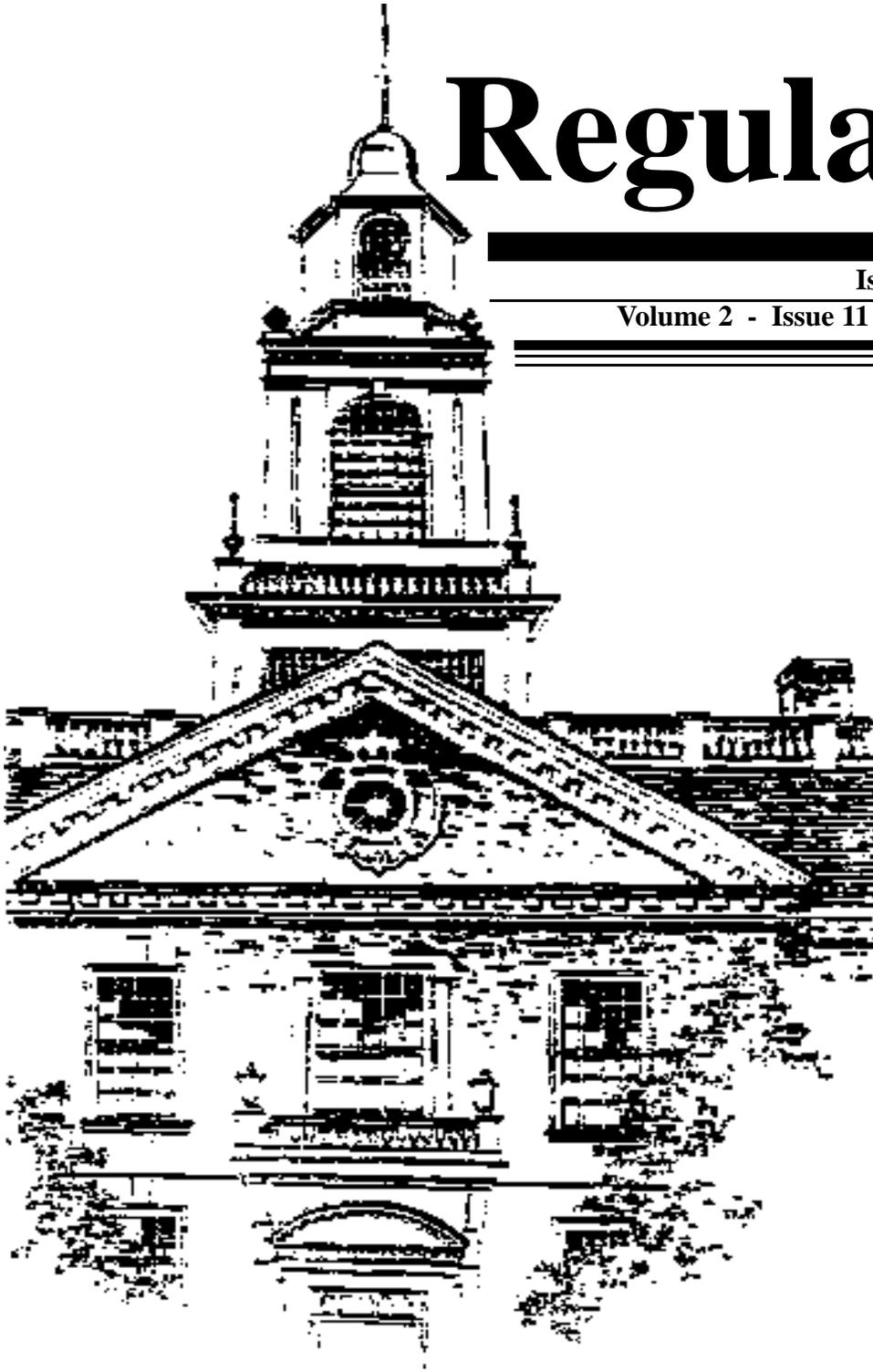


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# Delaware Register of Regulations



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Issue Date: May 1, 1999

Volume 2 - Issue 11

Pages 1919 - 2180

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Proposed  
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Pursuant to 29 Del. C. Chapter 11, Subchapter III, this issue of the Register contains all documents required to be published, and received on or before April 15, 1999.

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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## DELAWARE REGISTER OF REGULATIONS

The Delaware Register of Regulations is an official State publication established by authority of 69 Del. Laws, c. 107 and is published on the first of each month throughout the year.

The Delaware Register will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.

The Register will also publish some or all of the following information:

- Governor's Executive Orders
- Governor's Appointments
- Attorney General's Opinions in full text
- Agency Hearing and Meeting Notices
- Other documents considered to be in the public interest.

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### CITATION TO THE DELAWARE REGISTER

The Delaware Register of Regulations is cited by volume, issue, page number and date. An example would be:

2:6 **Del. R.** 1000 - 1010 (December 1, 1998) refers to Volume 2, Issue 6, pages 1000 - 1010 of the Delaware Register issued on December 1, 1998.

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### SUBSCRIPTION INFORMATION

The cost of a yearly subscription (12 issues) for the Delaware Register of Regulations is \$120.00. Single copies are available at a cost of \$12.00 per issue, including postage. For more information contact the Division of Research at 302-739-4114 or 1-800-282-8545 in Delaware.

## CITIZEN PARTICIPATION IN THE REGULATORY PROCESS

Delaware citizens and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.

Under 29 **Del.C.** §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the Register of Regulations pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the Register of Regulations. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation. The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the Register of Regulations. At the conclusion of all hearings and after receipt, within the time allowed, of all written materials, upon all the testimonial and written

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evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the Register of Regulations, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief.

No action of an agency with respect to the making or consideration of a proposed adoption, amendment or repeal of a regulation shall be subject to review until final agency action on the proposal has been taken.

When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.

Except as provided in the preceding section, no judicial review of a regulation is available unless a complaint therefor is filed in the Court within 30 days of the day the agency order with respect to the regulation was published in the Register of Regulations.

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## CLOSING DATES AND ISSUE DATES FOR THE DELAWARE REGISTER OF REGULATIONS

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| ISSUE<br>DATE | CLOSING<br>DATE | CLOSING<br>TIME |
|---------------|-----------------|-----------------|
| JUNE 1        | MAY 15          | 4:30 P.M.       |
| JULY 1        | JUNE 15         | 4:30 P.M.       |
| AUGUST 1      | JULY 15         | 4:30 P.M.       |
| SEPTEMBER 1   | AUGUST 15       | 4:30 P.M.       |
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| Subdivision Plan Review Fee Procedures.....   | 2:4  | <b>Del.R.</b> | 693 (Final)  |
| <br>Governor's Office   |      |               |              |
| Appointments & Nominations.....   | 2:1  | <b>Del.R.</b> | 145          |
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|   | 2:3  | <b>Del.R.</b> | 425          |
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|   | 2:5  | <b>Del.R.</b> | 790          |
|   | 2:6  | <b>Del.R.</b> | 1037         |
|   | 2:7  | <b>Del.R.</b> | 1295         |
|   | 2:8  | <b>Del.R.</b> | 1395         |
|   | 2:10 | <b>Del.R.</b> | 1909         |
| Executive Order No. 54 .....  | 2:1  | <b>Del.R.</b> | 143          |
| Executive Order No. 55 .....  | 2:6  | <b>Del.R.</b> | 1033         |
| Executive Order No. 56 .....  | 2:7  | <b>Del.R.</b> | 1293         |
| Executive Order No. 57 .....  | 2:8  | <b>Del.R.</b> | 1394         |
| Executive Order No. 58 .....  | 2:9  | <b>Del.R.</b> | 1675         |
| Executive Order No. 59 .....  | 2:10 | <b>Del.R.</b> | 1908         |

## Public Service Commission

## PSC Regulation Docket No. 4, Minimum Filing Requirements for all Regulated

Companies Subject to the Jurisdiction of the Public Service Commission.....2:1 **Del.R.** 81 (Prop.)Reproposal .....2:10 **Del.R.** 1741 (Prop.)PSC Regulation Docket No. 10.....2:6 **Del.R.** 946 (Prop.)PSC Regulation Docket No. 12 (Track III), Rules to Govern Payphone Services.....2:4 **Del.R.** 695 (Final)

## PSC Regulation Docket No. 41, Implementation of the Telecommunications Technology

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## PSC Regulation Docket No. 44, Information Required to be Filed by a Manufacturer to

Establish an Additional Dealer or to Relocate an Existing Dealership Pursuant to

6 Del.C. 4915(a) .....2:4 **Del.R.** 679 (Prop.).....2:6 **Del.R.** 1009 (Final)PSC Regulation Docket No. 45.....2:6 **Del.R.** 954 (Prop.)

## PSC Regulation Docket No. 47, Discounts for Intrastate Telecommunications and Information

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## Violent Crimes Compensation Board

Rules XXVI, XXVIII, XXIX, XXX.....2:5 **Del.R.** 773 (Prop.).....2:9 **Del.R.** 1670 (Final)

**Symbol Key**

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text. Language which is ~~stricken~~ through indicates text being deleted.

**Proposed Regulations**

Under 29 Del.C. §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the Register of Regulations pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the Register of Regulations. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation; The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

**DEPARTMENT OF  
ADMINISTRATIVE SERVICES**

**MERIT EMPLOYEE RELATIONS BOARD**

Statutory Authority: 29 Delaware Code,  
Section 5914 ( 29 Del.C. 5914)

**Public Notice**

**Proposed Changes to State of Delaware Merit Rules**

Please take notice that pursuant to 29 Del.C. 5914 and 29 Del.C. Chp. 101, a proposed change to Merit Rule Chapter 20 has been transmitted to the Merit Employee Relations Board of the State of Delaware from the Director of the Office of State Personnel.

The proposed change, which has been approved by the Director of the Office of State Personnel and the Statewide Labor Management Committee, will repeal the current Merit Rule Chapter 20 which is captioned "Employee Inquiries, Requests, Suggestions and Grievances" including Merit Rules No. 20.000 through 20.0420.

The repealed Chapter 20 will be replaced with a new Merit Rule Chapter 20 captioned "Grievance Procedure" and new Merit Rules No. 20.1 through 20.11 which will establish a revised procedure for filing and processing employee grievances under the Merit Rules of the State of Delaware.

The Merit Employee Relations Board will conduct a Public Hearing on the proposed change submitted by the Director on Tuesday, June 8, 1999, beginning at 9:00 a.m. in the Support Operations Training Center, 2<sup>nd</sup> Floor, 820 Silver Lake Blvd., Dover, Delaware.

The Merit Employee Relations Board will also receive and consider timely-filed written submissions from interested individuals and groups concerning the proposed new Merit Rule 20. The final date for any such written submissions is the date set forth above for the public hearing. Any such submissions should be mailed to delivered to the following address:

Merit Employee Relations Board  
Tatnall Building, Ground Floor  
150 William Penn Street  
Dover, DE 19901

Pursuant to 24 Del.C. 5914, the changes as proposed by the Director become final upon completion of the public hearing, unless rejected by a majority of the members appointed to the Board. Anyone wishing to obtain copies of the proposed changes to Merit Rule No. 20 or to present oral comments at the hearing should call Ms. Jean Lee Turner in the Merit Employee Relations Board office at (302) 739-6772.

**\*Please note that the current Merit Rule Chapter 20 is being repealed. Due to length is not being reprinted here. Copies of the existing Merit Rule Chapter 20 are available from the Merit Employee Relations Board or the Registrar.**

**PROPOSED REVISION TO  
LMC DRAFT CHAPTER 20 GRIEVANCE  
PROCEDURE**

Repeal current Chapter 20 of the Merit Rules and replace with the following rules.

20.1 To promote positive working relationships and better communications, employees and their supervisors shall informally meet and discuss employee claims of Merit Rule or Merit law violations prior to filing a formal grievance. Merit employees have the right to use this grievance procedure free of threats, intimidation or retaliation, and may have union or other representation throughout the process.

20.2 A "grievance" means an employee complaint about the application of the Rules or the merit System law (29 Delaware Code, Chapter 59), which remains unresolved after informal efforts at resolution have been attempted. A grievance shall not deal with the substantive policies embodied in the Merit System law.

20.3 An employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement. However, if the subject of the grievance is non-negotiable pursuant to 29 Del.C. 5938, it shall be processed according to this Chapter.

20.4 Failure of the employing agency to comply with time limits shall automatically move the grievance to the next step unless the parties have a written agreement to delay, or grievance have opposed in writing moving the grievance automatically to the next step. Failure of the grievance to comply with time limits shall void the grievance. The parties may agree to the extension of any time limits or to waive any grievance step. Grievances about demotions for just cause, suspensions or dismissals shall start at Step 2 within 14 calendar days in the manner set forth in 20.6.

20.5 Grievances about promotions are permitted only where it is asserted that (2) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 19.0100 or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

20.6 Step 1: Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. The following shall occur within 14 calendar days of receipt of the grievance; the parties shall meet and discuss the grievance

and the Step 1 supervisor shall issue a written reply.

20.7 Step 2: Any appeal shall be filed in writing to the top agency personnel official or representative within 7 calendar days of the receipt of the appeal: the designated management official and the employee shall meet and discuss the grievance, and the designated management official shall issue a written response.

20.8 Step 3: any appeal shall be filed in writing to the State Personnel Director within 14 calendar days of receipt of the Step 2 reply. This appeal shall include copies of the written grievance and responses from the previous steps. The parties and the Director (or designee) may agree to meet and attempt an informal resolution of the grievance, and/or the Director (or designee) shall hear the grievance and issue a written decision within 45 calendar days of the appeal's receipt. The Step 3 decision is final and binding upon agency management.

20.9 If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision or of the date of the informal meeting, whichever is later, a written appeal to the Merit Employee Relations Board (MERB) for final disposition according to 29 Del. C. 5931 and MERB procedures.

20.10 Retroactive remedies shall apply to the grievant only and, for a continuing claim, be limited to 30 calendar days prior to the grievance filing date. Any financial settlement shall be reduced by the amount of the grievant's earnings during the period covered by the settlement regardless of source, excluding part-time income which was being received prior to the separation.

20.11 Grievants may attend any meeting held pursuant to this Chapter without loss of pay; provided, however, grievance preparation and investigation time, and any discussion time with their grievance representative shall not be done during employee work time.

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**DIVISION OF PROFESSIONAL REGULATION**

**BOARD OF PHARMACY**

Statutory Authority: 24 Delaware Code,  
Section 2509 (24 Del.C. 2509)

**Notice of Proposed Regulations**

The Board of Pharmacy proposes changes to Regulation V(A)(7) and V(D)(3)(c), Dispensing and Regulation VI- D, Pure Drug Regulations, and a new Regulation XIV-

Administration of Injectable Medications in accord with the text that follows. The changes to Regulations V and VI require compliance with federal law and regulation and Regulation XIV is necessary to implement new statutory provisions for injections by pharmacists. A public hearing on the proposed changes will be held on June 9, 1999 at 9:00 a.m. in the third floor conference room of the Jesse Cooper Building, Room 309, Federal and Water Streets, Dover, DE 19901. The Board will also consider written comments received before June 1, 1999 by the Board of Pharmacy, Jesse Cooper Building, Room 205, Federal and Water Streets, Dover DE 19901. Following the public hearing, the Board will consider the proposed regulations at its regularly scheduled meeting immediately thereafter.

### **Regulation V. Dispensing. Paragraph A-7.**

Compounding - The art of the extemporaneous preparation and manipulation of drugs as a result of a practitioner's prescription order of initiative based on the practitioner/patient/pharmacist relationship in the course of professional practice including the reconstitution of powders for administration and the preparation of drugs in anticipation of drug orders based on routine, regularly observed prescribing patterns. Pharmaceutical compounding must be in compliance with FFDCSA Section 503A and any regulations promulgated by FDA concerning compounding, pertaining to this section.

### **Regulation V Dispensing, Paragraph D-3-c.**

Compounding is the responsibility of the pharmacist or the pharmacy intern under the direct supervision of the pharmacist. All compounding must be in compliance with FFDCSA Section 503A and any regulations promulgated by FDA concerning compounding pertaining to this section. The pharmacist may utilize the assistance of supportive personnel if the following is performed:

### **Regulation VI. Pure Drug Regulations. Paragraph D**

All biologicals, vaccines, drugs, chemicals, preparations and compounds must be packaged, labeled, stored and preserved in compliance with USP/NF and all other State and Federal standards. A pharmacist may, with the permission of the patient or the patient's agent, provide a "Customized Patient Medication Package" only to patients that are self-medicating. The containers shall meet all of the requirements of the USP/NF standard entitled, "Customized Patient Medication Package."

### **Regulation XIV. Administration of Injectable Medications.**

#### A. Purpose

The purpose of this regulation is to implement provisions relating to the training, administration, and documentation of injectable medications, biologicals, and adult immunizations by pharmacists, pursuant to Chapter 25, Title 24 of the Delaware Code relating to Pharmacy.

#### B. Educational Requirements

1. In order to administer injectable medications, biologicals, and adult immunizations a licensed pharmacist shall provide proof that the following requirements have been satisfied:

a. The satisfactory completion of an academic and practical curriculum approved by the Board of Pharmacy which includes, but is not limited to, disease epidemiology, vaccine characteristics, injection technique, emergency response to adverse events, and related topics.

b. A current Cardio-Pulmonary Resuscitation (CPR) certificate acceptable to the Board of Pharmacy.

2. A registered pharmacist may only administer injections consistent with public health and safety and in a competent manner consistent with the academic curriculum and training completed.

3. Continued competency shall be maintained. A minimum of two hours (0.2 C.E.U.) of the thirty hour requirement for continuing education, every licensure period, must be dedicated to this area of practice.

4. Documentation of the satisfactory completion of the proper academic and practical training requirements shall be listed in a policy and procedures manual available for inspection by the Board of Pharmacy. Maintaining such a policy and procedures manual shall be the responsibility of each registered pharmacist administering injections.

#### C. Practice Requirements

1. The pharmacist must maintain a manual with policies consistent with OSHA (Occupational Exposure to Bloodborne Pathogens) and procedures for dealing with acute adverse events.

2. Practitioner-approved written protocols and/or prescriptions will be maintained and available for inspection by the Board of Pharmacy.

3. The pharmacist, before administering an injectable medication, biological, or immunization, must counsel the patient and/or the patient's representative about contraindications and inform them in writing in specific and readily understood terms about the risks and benefits. A signed copy of the patient's consent shall be filed and available for inspection by the Board of Pharmacy.

4. The pharmacist must document all injections made and have such documentation available for inspection by the

Board of Pharmacy. Documentation shall include:

a. Patient's name, address, phone number, date of birth, and gender.

b. Medication or vaccine administered, expiration date, lot number, site of administration, dose administered.

c. Date of original order and the date of administration(s).

d. The name of the prescribing practitioner and the pharmacist administering the dose.

5. The pharmacist must document fully and report all clinically significant adverse events to the primary-care provider and to the Vaccine Adverse Event Reporting System (VAERS) when appropriate.

6. The pharmacist shall provide documentation to each person receiving immunizations and when appropriate to the Immunization Section of the Department of Health and Social Services so the names of those individuals can be added to the Vaccination Registry.

7. All documentation and records required by this Regulation must be maintained for a period of not less than three years.

**D. Classes and Indications of Approved Medications**

Classes of medications shall include injectable medications, immunizations, and biologicals when administered in accordance with indications approved by the Food & Drug Administration or drugs under clinical study.

**E. Authorization**

Only those registered pharmacists meeting the requirements of this Regulation shall administer injectable medications, biologicals, and adult immunizations. The Board of Pharmacy shall maintain a current list of those pharmacists so authorized. It is the responsibility of each registered pharmacist to maintain his or her current status on such list.

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**DEPARTMENT OF EDUCATION**

Statutory Authority: 14 Delaware Code,  
Section 122(d) (14 Del.C. 122(d))

**Educational Impact Analysis Pursuant  
To 14 Del.C., Section 122(d)**

**Recruiting And Training of Professional Educators  
For Critical Curricular Areas**

**A. TYPE OF REGULATORY ACTION REQUESTED**

Amendment to Existing Regulation

**B. SYNOPSIS OF SUBJECT MATTER OF REGULATION**

The Secretary seeks the consent of the State Board of Education to amend the regulation Recruiting and Training of Professional Educators for Critical Curricular Areas found on Pages 1-18 to 1-26 in the Handbook for Personnel Administration for Delaware School Districts. The amendments are necessary to change the language from the Department of Public Instruction to the Department of Education and to change the words must and will to shall.

**C. IMPACT CRITERIA**

1. Will the amended regulation help improve student achievement as measured against state achievement standards?

The amended regulation deals with scholarship and loan programs for the recruiting and training of teachers, not with curriculum issues.

2. Will the amended regulation help ensure that all students receive an equitable education?

The amended regulation deals with scholarship and loan programs for the recruiting and training of teachers, not with equity issues.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected?

The amended regulation deals with scholarship and loan programs for the recruiting and training of teachers, not with health and safety issues.

4. Will the amended regulation help to ensure that all students' legal rights are respected?

The amended regulation deals with scholarship and loan programs for the recruiting and training of teachers, not with student's legal rights issues.

5. Will the amended regulation preserve the necessary authority and flexibility of decision makers at the local board and school level?

The amended regulation will preserve the necessary authority and flexibility of decision makers at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

The amended regulation will not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.

7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity?

The decision making authority and accountability for addressing the subject to be regulated will remain in the same entity.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational

policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

The amended regulation will be consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation?

The regulation needs to be amended to correct the language referring to the Department of Education and the use of the word "shall".

10. What is the cost to the state and to the local school boards of compliance with the regulation?

There is no additional cost to the state and local boards of education for compliance with the amended regulation.

## 200.9 Recruiting and Training of Professional Educators for Critical Curricular Areas

~~Title 14, Chapter 11, Delaware Code provides for the establishment of a statewide program for the recruiting and training of certain professional educators who will serve the pupils in the public elementary and secondary schools of the State in critical curricular areas. The statute specifies five distinct programs for meeting this objective and places responsibility for the administration of the programs on the State Board of Education.~~

The programs ~~will~~ shall be administered in accordance with 14 Del. C., Chapter 11, and the following rules and regulations pursuant to the appropriation of funds in the annual Budget Bill.

1.0 ~~1-~~ **Designation of Critical Curricular Areas** - Annually, on a date not later than the July meeting of the State Board of Education, the Certification and Personnel Division of the Department of ~~Public Instruction~~ Education shall present a recommendation to the State Board on the Critical Curricular Areas to be addressed during that fiscal year. This recommendation will be based upon supply and demand information obtained from local school districts and from state and national sources. ~~(For the 1984-85 year, the identified critical areas are as follows: Mathematics (grades 7-12), Chemistry, Physics, and Physical Science.)~~

2.0 ~~2-~~ **Allocation of Funds** - Annually, on a date not later than the July meeting of the State Board of Education, the ~~Secretary of Education~~ Instructional Services Branch of the ~~Department of Public Instruction~~, shall present a recommendation to the State Board of Education on the preliminary allocation of funds among the five programs authorized by Chapter 11. Final allocations will be based upon the total appropriation for that fiscal year and the number of eligible applicants for the five programs.

3.0 ~~3-~~ **Applications** - All applicants for funds under any of the five programs shall be required to complete an

application on a form prescribed by the Department of ~~Public Instruction~~ Education and shall be required to provide whatever information and documents the Department determines are necessary for the effective and efficient management of the programs.

4.0 ~~4-~~ **Academic Year Institute** - The Academic Year Institute is an ongoing program specifically designed to meet certification requirements in the critical areas of teacher shortage as determined by the State ~~Board~~ Department of Education. This is a part-time program which shall be offered during the regular school year. Participants will register for a maximum of three semester hours of graduate/undergraduate college courses per semester. The Institute will be sponsored by the State ~~Board~~ Department of Education and will be located at the University of Delaware and/or Delaware State College.

### 4.1 ~~a-~~ **Eligibility**

4.1.1 ~~(1)~~ The candidate ~~must~~ shall be employed as a teacher in the public schools of Delaware or in another State agency offering secondary education programs.

4.1.2 ~~(2)~~ The candidate ~~must~~ shall submit a completed application and other documentation and information by the specified closing date for application.

4.1.3 ~~(3)~~ The candidate ~~must~~ shall express an intent to enroll in a course or courses which will lead to certification in one or more of the critical curricular areas.

### 4.2 ~~b-~~ **Financial Aid**

4.2.1 ~~(1)~~ Academic Year Institute participants ~~will~~ shall receive full support for tuition, textbooks, laboratory fees and mileage for approved courses.

4.2.2 ~~(2)~~ Depending upon the institution and the course or courses in which the participant is enrolled, the State ~~Board~~ Department of Education ~~will~~ shall either make direct payment to the institution for tuition and laboratory fees or will reimburse the participant for costs upon receipt of proper documentation of the participant's expenses.

4.2.3 ~~(3)~~ The State ~~Board~~ Department of Education ~~will~~ shall reimburse the participant for expenditures for textbooks and mileage upon receipt of a completed personal reimbursement form.

### 4.3 ~~e-~~ **Selection Procedures**

4.3.1 ~~(1)~~ Participants ~~will~~ shall be selected competitively from the eligible applicants for the program within the limits of the funds authorized for the program.

4.3.2 ~~(2)~~ An application review panel, composed of Department of ~~Public Instruction~~ Education staff members, shall meet twice each year - after the close of the application period for each semester - to review applications and select participants.

5.0 ~~5-~~ **Summer Inservice Program** (Summer Institute) - The Summer Institute Program is a summer program specifically designed to meet certification requirements in the critical areas of teacher shortage as determined by the State ~~Board~~ Department of Education.

The program will be offered during a six-week period in the summer beginning not later than the last week in June. Participants ~~will~~ shall register for a minimum of six semester hours of graduate/undergraduate credit in a specifically designed program focused on building skills and knowledge in the critical curricular areas. The Summer Institute, modeled after the National Science Foundation format, ~~will~~ shall be sponsored by the State ~~Board~~ Department of Education and will be located at the University of Delaware and/or Delaware State College.

**5.1 a. Eligibility**

5.1.1 (1) The candidate ~~must~~ shall be employed as a teacher in the public schools of Delaware or in another State agency offering secondary education programs.

5.1.2 (2) The candidate ~~must~~ shall not be currently certifiable in the critical curricular area being addressed by the Summer Institute for which application is made.

5.1.3 (3) The candidate ~~must~~ shall submit a completed application and other required information and documentation by the closing date for application.

5.1.4 (4) The candidate ~~must~~ shall express an interest and intent to pursue certification in one or more of the critical curricular areas for which he or she is not currently certifiable.

5.1.5 (5) The candidate ~~must~~ shall submit a letter of recommendation from the Superintendent or an appropriate supervisor of the candidate's school district or agency.

**5.2 b. Financial Aid**

5.2.1 (1) Summer Institute participants ~~will~~ shall receive full support for tuition, textbooks, and laboratory fees. Depending on the institution and the program in which the participant is enrolled, the State ~~Board~~ Department of Education ~~will~~ shall either make direct payment to the institution for these costs or ~~will~~ shall reimburse the participant upon receipt of proper documentation of the participant's expenses.

5.2.2 (2) The participants ~~will~~ shall also receive a stipend of \$250 per week, up to a maximum of \$1,500 for a six-week Institute. This stipend ~~will~~ shall be paid by the State ~~Board~~ Department of Education to the participant upon receipt of notification from the institution that the participant successfully completed all courses taken with a minimum grade of "C".

**5.3 e. Selection Procedures**

5.3.1 (1) Participants ~~will~~ shall be selected competitively from the eligible applicants for the program within the limits of the funds authorized for the program.

5.3.2 (2) An application review panel, composed of Department of ~~Public Instruction~~ Education staff members, shall meet annually after the close of the application period to review applications and select participants.

**6.0 6. Program For Persons From Other Professions Who Will Prepare To Teach** - This program is designed to

provide financial assistance to persons from other professions who possess the training and skills to teach in the critical curricular areas of teacher shortage as determined by the State Board of Education but who lack the professional education courses required to qualify for a standard certificate. Participants ~~will~~ shall be permitted to enroll in the institution of higher education of their choice and ~~will~~ shall be reimbursed for the tuition costs, within limits specified below, for up to six semester hours of credit per semester.

**6.1 a. Eligibility**

6.1.1 (1) The candidate ~~must~~ shall be a resident of the State of Delaware.

6.1.2 (2) The candidate ~~must~~ shall have a graduate or undergraduate degree from an accredited institution of higher education in a field related to one or more of the critical curriculum areas.

6.1.3 (3) The candidate ~~must~~ shall first submit official transcripts to the Certification and Personnel Division of the Department of ~~Public Instruction~~ Education for evaluation.

6.1.4 (4) Candidates who lack no more than six semester credits of coursework from meeting the content area requirements in one or more of the critical curriculum areas ~~will~~ shall be invited to apply for participation in the program.

6.1.5 (5) The candidate ~~must~~ shall submit a completed application form and must express an interest and intent to pursue certification.

6.1.6 (6) The candidate ~~must~~ shall submit a plan outlining educational plans, including a timeline, to complete the professional education courses needed to obtain certification.

**6.2 b. Financial Aid**

6.2.1 (1) The participant ~~will~~ shall receive financial support for tuition costs for up to six semester hours of credit per semester.

6.2.2 (2) The participant may receive assistance for a maximum of thirty semester credits of professional education courses but must update his or her application and receive approval in advance each semester.

6.2.3 (3) The participant ~~will~~ shall be reimbursed for tuition costs in an amount not greater than the tuition charged a Delaware resident by the University of Delaware for a course or courses of equal credit value.

6.2.4 (4) The State ~~Board~~ Department of Education ~~will~~ shall reimburse the participant upon receipt of proper documentation of the participant's expenses and upon receipt of notification from the institution that the participant successfully completed the courses for which reimbursement is requested with a minimum grade of "C".

**6.3 e. Selection Procedures**

6.3.1 (1) An application review panel, composed of Department of ~~Public Instruction~~ Education staff members

will shall meet on an as-needed basis to review applications and select participants.

6.3.2 (2) Participants ~~will~~ shall be selected from eligible applicants on a first-come basis, except that applicants approved for one semester will be given preference in future semesters until they complete their educational requirements, use their total eligibility, or are unsuccessful in achieving the minimum grade of "C" in approved courses.

6.3.3 (3) Participants ~~will~~ shall be limited and the approval process will be terminated when authorized funds for this program in any fiscal year have been allocated.

7.0 7- **Teacher Scholarship Loan Programs** - The Teacher Scholarship Loan Program is designed to meet certification requirements in the critical areas of teacher shortage as determined by the State ~~Board~~ Department of Education. This is a full-time program offered during the regular school year. As a minimum, participants ~~will~~ shall register for the number of semester hours required of a full-time student.

#### 7.1 a- Eligibility

7.1.1 (4) The candidate ~~must~~ shall have taught in a Delaware public school for at least one year prior to the year in which the scholarship is to be used.

7.1.2 (2) The candidate ~~must~~ shall be employed as a teacher in a Delaware public school and/or must be a resident of the State of Delaware at the time of application.

7.1.3 (3) The candidate ~~must~~ shall express an interest and intent to pursue certification in one or more of the critical curricular areas identified by the State ~~Board~~ Department of Education.

7.1.4 (4) The candidate ~~must~~ shall hold a standard Delaware teaching certificate but must not be currently certifiable in the critical curricular area specified in (3) 7.1.3 above.

7.1.5 (5) The candidate ~~must~~ shall submit a completed application and other documentation and information by the specified closing date for application.

7.1.6 (6) The candidate ~~must~~, shall, if currently employed, have prior approval from his or her employing local district board of education.

7.1.7 (7) The candidate ~~must~~ shall be accepted into an approved program in an institution of higher education leading to certification in the critical curriculum area specified in (3) 7.1.3 above.

#### 7.2 b- Financial Aid

7.2.1 (4) Teacher Scholarship Loan Program participant ~~will~~ shall receive a scholarship in an amount equal to the salary he or she would receive for 185 days of service as a teacher, as specified in Chapter 13, Title 14, Delaware Code.

7.2.2 (2) A participant, who was employed by a Delaware public school district in the year prior to receipt of the scholarship and who is on leave of absence during the

year of the scholarship, shall continue to receive all State-supported employee benefits through a grant from the State Board to the employing district. (Such participants shall be considered to be on sabbatical leave and for purposes of salary increments and pension eligibility and computation, a year of leave shall be considered a year of experience as provided in §1325(9), Title 14, Delaware Code.)

7.2.3 (3) A participant may receive a local salary supplement and local employee benefits if the employing district elects to provide them at the expense of the employing district.

7.2.4 (4) A district ~~will~~ shall also be eligible to receive an interest-free loan, in an amount not to exceed \$5,000, which the participant may use to defray the cost of tuition and books. The actual amount of the loan will be dependent upon estimated costs of these two items and other financial resources available to the participant.

7.2.5 (5) Participants receiving a loan shall execute a promissory note, in the amount of the loan, to the State Treasurer. This note will be forgiven at the rate of one-third of the loan for each of three years of teaching in a Delaware public school after completion of the study authorized. In any year the teacher fails to meet the teaching obligation, the loan shall be due and payable for the unpaid balance plus interest specified in the note.

#### 7.3 e- Selection Procedures

7.3.1 (4) Participants ~~will~~ shall be selected competitively from the eligible applicants for the program within the limits of the funds authorized for the program.

7.3.2 (2) The applicant review panel, composed of Department of ~~Public Instruction~~ Education staff members, shall meet once each year at the close of the application period to review applications.

8.0 8- **Student Loan Program** - The Student Loan Program is for Delaware residents who are accepted into an institution of higher learning to be trained as a teacher in the critical area of teacher shortage as determined by the State ~~Board~~ Department of Education. A student selected for the program may attend any accredited college or university in the United States where the appropriate training will result in certification as a teacher for a critical area of teacher shortage as determined by the State ~~Board~~ Department of Education.

#### 8.1 a- Eligibility

8.1.1 (4) The candidate ~~must~~ shall have been a Delaware resident for a period of one year at the time of application.

8.1.2 (2) The candidate ~~must~~ shall have Scholastic Aptitude Test (SAT) scores of 500 verbal and 500 quantitative. Candidates already in a college or university program must be maintaining a "C" average or better in courses in the critical curriculum areas.

8.1.3 (3) The candidate ~~must~~ shall have been admitted to an accredited college or university program

directed toward certification in a critical curricular area as determined by the State ~~Board~~ Department of Education.

8.1.4 (4) The candidate ~~must~~ shall submit a completed application and other documentation and information by the specified date for application.

8.2 ~~b.~~ **Financial Aid**

8.2.1 (4) Student Loan Program participants ~~will~~ shall receive a maximum loan of \$5,000 for one year's study, less scholarship aid available from other sources.

8.2.2 (2) The loan may be renewed from year to year through a four-year training program.

8.2.3 (3) Participants in the Student Loan Program shall execute a promissory note, in the amount of the loan, to the State Treasurer. The entire note will be forgiven on the basis of two years of teaching in a Delaware public school in a critical curriculum area for each year of loan granted.

8.2.4 (4) Each year of the loan will be interest-free to those who meet the two-year teaching obligation for each year of loan granted.

8.2.5 (5) In the event that the participant does not graduate, does not continue to study in the critical curriculum area, or does not meet the teaching obligation, the entire loan, with interest specified by the State Treasurer, shall be due and payable. Payment of the note and interest shall be in accordance with the time schedule specified in the note.

8.3 ~~e.~~ **Selection Procedures**

8.3.1 (4) Participants ~~will~~ shall be selected competitively from the eligible applicants for the program within the limits of the funds authorized for the program.

8.3.2 (2) The applicant review panel, composed of Department of ~~Public Instruction~~ Education staff members, shall meet twice each year at the close of the application period for each semester to review applications.

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**Educational Impact Analysis Pursuant  
To 14 Del. C., Section 122(d)**

**Health Examinations for School District Employees**

**A. TYPE OF REGULATORY ACTION REQUESTED**

Amendment to Existing Regulation

**B. SYNOPSIS OF SUBJECT MATTER OF REGULATION**

The Secretary seeks the consent of the State Board of Education to amend the regulation Health Examinations found on page 1-10 in the Handbook for Personnel Administration for Delaware School Districts. The amendment is necessary to change the outdated language "free from any disease or physical defect or emotional instability" to "free from any medical condition".

**C. IMPACT CRITERIA**

1. Will the amended regulation help improve student achievement as measured against state achievement standards?

The amended regulation deals with health examinations for school district employees, not curriculum issues.

2. Will the amended regulation help ensure that all students receive an equitable education?

The amended regulation deals with health examinations for school district employees, not equity issues for students.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected?

The amended regulation deals with health examinations for school district employees which can effect the health and safety of students.

4. Will the amended regulation help to ensure that all students' legal rights are respected?

The amended regulation deals with health examinations for school district employees, not students' legal rights.

5. Will the amended regulation preserve the necessary authority and flexibility of decision makers at the local board and school level?

The amended regulation will preserve the necessary authority and flexibility of decision makers at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

The amended regulation will not place any unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.

7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity?

The decision making authority and accountability for addressing the subject to be regulated will remain in the same entity.

8. Will the regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

The regulation will be consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation?

The regulation needs to be amended in order to update the language.

10. What is the cost to the state and to the local school boards of compliance with the amended regulation?

There is no cost to the state and to the local school boards for compliance with the amended regulation.

## 800.21 Health Examinations for School District Employees

1.0 At initial employment in a school district, all employees shall file, together with other employment credentials, a physician's certification that he or she is free from any disease or physical defect or emotional instability free from any medical condition that would interfere with the performance of duties and function of the school district.

### Repeal of Regulation on Maternity Leave

The Secretary of Education seeks the consent of the State Board of Education to repeal the regulation Maternity Leave found on pages 7-2 to 7-4 in the Handbook for Personnel Administration for Delaware School Districts. It is necessary to repeal the regulation to reflect the repeal in 1997, of 14 Del. C., Section 1323 on Maternity Leave. The Federal Family and Medical Leave Act of 1993 (FMLA) now serves as the basis of all family leave policies both at the Department of Education and in each local school district.

#### Maternity Leave

In accordance with the rules and regulations of the Federal Register, Vol. 37, No. 66, dated Wednesday, April 5, 1972, and with the instructions of the Attorney General in an opinion of August 17, 1972, the State Board of Education has approved the following rules and regulations as being in effect until the Delaware maternity leave law is amended to conform with the Federal law:

a. Illnesses and temporary disabilities associated with pregnancy shall be treated as any other illness and shall be subject to the provisions of Delaware Code, Title 14, §1318, entitled, Sick Leave and Absence for Other Reasons, except for the following provisions necessitated by reasons of "business necessity" or optionally granted provisions for the additional benefit of the employee, said exceptions reflecting the practicalities of the situation.

b. An employee who is ill because of pregnancy may be absent and remain on the payroll under the provisions of §1318 for any number of days to which the employee has earned entitlement under the provisions of the section, except as otherwise herein provided.

c. Prior to the expected delivery of a child, absence with pay will be recognized in accordance with §§1318, 1319, entitled, Records of Absence: Proof, and §1320, entitled, Deduction for Unexcused Absence, as these sections may be applicable.

d. Beginning with the day on which the child is born to an employee, that employee may continue to be absent from employment and remain on the payroll to the extent of

earned entitlement under §1318 for each working day in a period of twenty eight (28) calendar days.

Any employee who is absent for any illness during all of the working days in a period of twenty eight (28) calendar days may remain on the payroll for that period but if then unable to return to work assignment, said employee shall present a report concerning the condition of illness.

The employee may extend the number of days of absence with pay beyond that defined above upon certification of illness by an attending physician and subject to earned eligibility for sick leave time.

e. An employee who is absent on account of pregnancy or other temporarily disabling illness but who has not earned or who does not have a sufficient reserve of earned sick leave days under §1318, may be absent in accordance with the provisions in Paragraphs (c) and (d) above, without any jeopardy to employment status but without pay for the period of time after exhaustion of earned sick leave, if any.

f. An employee who is absent in accordance with the provisions of Paragraphs (c), (d), or (e) above, on account of pregnancy or after the delivery of a child, may request and shall be granted additional days of absence, without pay, in accordance with the provisions of Paragraphs (g), (h), (i), and (j) of this section without any showing of illness regarding the additional days.

An employee who is absent in accordance with provisions of Paragraphs (d) or (e) on account of other temporarily disabling illness shall present a physician's certification as documentation in support of the request.

g. As a condition for the granting of such additional leave, the employee shall indicate to the Board of Education of the school district that said employee will, at the completion of the leave and on such date as is determined in agreement with the Board, return to regular employment in the district or resign from the position held, thus authorizing the Board to employ a regular, full-time person.

h. The maximum additional days of leave requested by and granted to an employee may be for the remainder of any semester during which the illness occurs and the next succeeding semester of that or the subsequent school term. In the event that a classroom teacher requests additional days of leave without pay for a period shorter than that referred to above, the Board of Education of the school district may require that the teacher remain absent from school until some appropriate and regularly scheduled change in the school schedule, such as the end of a semester, or a marking period.

i. At the end of any leave as herein described, the professional employee shall be accepted into full-time employment by the leave-granting Board and assigned to the same or a similar position to the one from which leave was granted. In no case may assignment be made so as to invalidate a professional employee's certification status or to bring about a demotion in position or salary for the

employee.

~~j. The period of absence granted under these provisions during which an employee remains on paid sick leave shall be applicable to the determination of experience, salary or pension eligibility and the computation of pension eligibility time in the same manner as any other absence under 14 Delaware Code § 1318.~~

~~k. No State funds shall be used for any payment of salaries to persons absent under the provisions of these sections, except as provided for in 14 Delaware Code §1318 and 1319.~~

(State Board of Education regulation, September 21, 1972.)

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**Educational Impact Analysis Pursuant  
To 14 Del. C., Section 122(d)**

**Teacher of the Year Award**

A. TYPE OF REGULATORY ACTION REQUESTED  
Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF  
REGULATION

The Secretary of Education seeks the consent of the State Board of Education to amend the regulation Teacher of the Year Award found on pages 1-14 to 1-16 (a) in the Handbook for Personnel Administration for Delaware School Districts. The amendment deletes the portions of the regulation that are found in 14 Del. C., Chapter 89 leaving the sections on Qualifications and Nominations as Department of Education regulations. The language is also amended to reflect the change from the Department of Public Instruction to the Department of Education and to change the words should and will to the word shall.

C. IMPACT CRITERIA

1. Will the amended regulation help improve student achievement as measured against state achievement standards?

The amended regulation deals with an awards program for teachers, not specifically with curriculum standards.

2. Will the amended regulation help ensure that all students receive an equitable education?

The amended regulation deals with an awards program for teachers and not with curriculum issues.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected?

The amended regulation deals with an awards programs for teachers, not with health and safety issues.

4. Will the amended regulation help to ensure that all students' legal rights are respected?

The amended regulation deals with an awards program for teachers, not with students' legal rights.

5. Will the amended regulation preserve the necessary authority and flexibility of decision makers at the local board and school level?

The amended regulation will preserve the necessary authority and flexibility of decision makers at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

The amended regulation will not place any unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school level.

7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity?

The decision making authority and accountability for addressing the subject to be regulated will remain in the same entity.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

The amended regulation will not be an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation?

The regulation needs to be amended to remove those elements that are already in the Del. C.

10. What is the cost to the state and to the local school boards of compliance with the amended regulation?

There is no additional cost to the state or to the local boards for compliance with the amended regulation.

**200.8 Teacher of the Year Award**

~~Title 14, Chapter 89, establishes a series of Teacher of the Year awards in order to reward outstanding teachers throughout the state. All school districts shall follow these rules and 14 Delaware Code Chapter 89 which in combination constitute the basis for the award grants. These rules shall be applicable to the Teachers of the Year named during the fiscal year ending June 30, 1991, and annually thereafter.~~

~~Teacher of the Year Award~~

This program shall be administered in accordance with 14 Del. C., Chapter 89, and the following rules and regulations.

~~Procedures — Each year every school district throughout this state shall conduct a study within each school building to determine those certified employees (teachers) who are deserving of the title "Teacher of the Year" from that building. The selection process will follow the current guidelines which have been developed by the State Board of Education which includes input from teachers, administrators, and Department of Public Instruction Staff. After the buildings make their individual selections, the District-wide Teacher of the Year shall be selected from each District, following the current guidelines. The final step will be the selection of the State Teacher of the Year.~~

1.0 Qualifications - To be considered for the Teacher-of-the-Year award, a person shall have taught, continuously or intermittently, for an accumulative period of nine months or more previous to the date of such person's nomination; shall have been formally nominated; and be actively teaching in this State at the time of nomination. A nominee shall be a person fully certified by the State ~~Board~~ Department of Education for the position held.

2.0 Nominations - The following guidelines shall apply in preparing nominations in accordance with the requirements of the Act.

2.1 a. ~~The State Superintendent of Public Instruction~~ Department of Education shall annually send to each school district superintendent detailed instructions and proper forms for the presentation of nominees. Each district superintendent is invited to nominate one teacher employed by the district.

2.2 b. Nominees ~~should~~ shall be skillful and dedicated teachers, pre-kindergarten through Grade 12, who plan to continue as teachers. Personnel whose main responsibilities are administrative or supervisory, such as principals or guidance counselors, are not eligible.

2.3 c. Nominees ~~should~~ shall have the respect and admiration of students, parents, and co-workers. They should play active and useful roles in their communities as well as in their schools. They should be poised and articulate and have the energy and equanimity to be able to withstand a busy schedule.

2.4 d. The most important qualification is a superior ability to inspire students of all backgrounds and abilities to learn.

2.5 e. Each district ~~will~~ shall submit a portfolio describing the nominee and setting forth her or his positions on educational issues. Format will be based on that of the National Teacher of the Year program.

2.6 f. Staff members of the Department ~~will~~ shall review each portfolio and ~~will~~ shall observe each teacher at work. Based on reading of the portfolios and observations, the Department selectors will designate not more than five finalists for consideration by judges.

2.7 g. Judges from outside of the Department ~~will~~ shall evaluate the finalists. Those invited as judges will be

the three most recent previous state Teachers of the Year; the president of the State PTA; the president of the State Student Council Association; and a member of the State Board of Education.

2.8 h. The judges ~~will~~ shall recommend one person for the state superintendent to declare as state Teacher-of-the-Year.

~~Basic Awards — Not later than thirty calendar days following the announcement of the name of the State Teacher of the Year, the State Superintendent of Public Instruction Secretary of Education shall direct the transfer of funds from the appropriate State Board Department of Education account into a special account in each school district for use by its Teacher of the Year. Section 8903, Title 14, cites two basic awards: those individuals who are chosen as Teacher of the Year for their respective school districts will be awarded \$2000; the person who is chosen State Teacher of the Year shall be awarded \$3000 in addition to the district-level award. These funds are awarded with no restriction on how they will be used; they should be considered as salary bonuses.~~

~~Educational Benefit Award — The State Teacher of the Year will shall receive, in addition, a grant of \$5000 to use for the educational benefit of his or her students.~~

~~a. No amount or portion of this \$5000 award shall be used for the personal benefit of the award recipient; provided, however, that in the use of this fund for educational purposes the recipient may be an indirect or incidental beneficiary as teacher of the benefited pupils. In the event that all funds set aside for an award recipient have not been completely expended by that recipient at the time when a subsequent award is granted, the remainder of the former recipient's award shall not revert, but shall remain set aside in the name of such former recipient until such time as it is totally expended or the recipient dies or leaves the State.~~

~~b. The recipient shall present to the superintendent of the school district in which he or she is employed a plan for utilization of the fund. Such submission shall not waive the right of the recipient to judge and choose but shall be in order to avoid wasteful duplication of materials or violation of school district policy regarding students, materials, or activities. The principal criterion for use of the Fund shall be that of educational benefit to pupils. The Fund may be designated for, but not limited to, such items as:~~

~~• Purchase of non consumable materials and supplies; e.g., library books, audio visual equipment, computer equipment and programs, musical instruments, specialized furniture.~~

~~• Purchase of otherwise consumable materials that are used in the production of a student designed item; e.g., artist's or draftsman's paper, canvas, paints, instruments, wood and metal.~~

~~• Payment for student travel; e.g., prepared visits to museums, theaters, historic sites, laboratories when these are related to classroom study.~~

~~• Employment of performers and consultants; e.g., touring companies of a dramatic or musical group, visiting artist, poet, author, musician or historian.~~

~~• Reimbursements to the recipient, not to exceed \$500, for personal expenses.~~

~~e. Where the recipient has purchased materials, equipment or any other durable item with award funds, such item shall be the property of the Delaware school district in which the recipient is employed at the time of the expenditure. Each invoice, purchase order and personal reimbursement form related to withdraws from Teacher of the Year award funds shall be retained by the school district, and shall be available for inspection as public records and subject to regular audit by the State Auditor of Accounts. (Section 8905)~~

~~Pension Modification – Each Teacher of the Year, on every level, shall have added to his or her final year of salary the dollar amount of his or her basic Teacher of the Year awards, as cited in Section 8903, solely for computing the final average compensation for pension purposes. (Section 8906)~~

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## **DEPARTMENT OF HEALTH AND SOCIAL SERVICES**

### **DIVISION OF PUBLIC HEALTH**

#### **OFFICE OF DRINKING WATER**

Statutory Authority: 16 Delaware Code,  
Section 122(3)(c) (16 Del.C. 122(3)(c))

The Division of Public Health, Delaware Health and Social Services, will hold a public hearing to discuss proposed revisions to the “State of Delaware Regulations Governing Public Water Drinking Water Standards.”

The Public Hearing will be held on Thursday, May 27, 1999, at 2 p.m. The Hearing will be held at the Jesse Cooper Building, Federal and Water Streets, Dover, Delaware, in the third floor conference room (Room 309).

Copies of the proposed revisions to the “State of Delaware Regulations Governing Public Drinking Water Standards” are available at the following location:

Office of Drinking Water  
Health Systems Protection  
Jesse Cooper Building  
Second Floor  
Federal and Water Streets  
Dover, Delaware

Anyone wishing to submit written comments should submit such comments no later than May 31, 1999. Please submit comments to:

Jeff Beaman  
Delaware Division of Public  
Jesse Cooper Building  
P.O. Box 637  
Dover, DE 19903

### **Summary of regulatory changes to the “State of Delaware Regulations Governing Public Drinking Water Systems” in order to incorporate new capacity development requirements of the Safe Drinking Water Act**

The Delaware Health & Social Services is proposing changes to the “State of Delaware Regulations Governing Public Drinking Water Systems.” Following are the proposed changes:

A new section is added to incorporate the definition for capacity. §22.106: Capacity, defines capacity and provides definitions of the principle elements of technical, managerial, and financial capacity as they apply to public water systems

Section 22.211: Plans and Specifications, has been modified to incorporate the new capacity development requirements and update the plan review requirements by establishing national standards to be used when submitting plans. §22.211 A (1), establishes *Ten States Standards, National Sanitation Foundation* or approved equivalent as engineering standards for construction of new or alterations to existing public water systems. §22.211 B establishes the requirement that new public water systems, those beginning operation after October 1, 1999, must submit an application for capacity development review. This section also adds the requirement that new water systems must use a professional engineer to prepare plans and specifications.

Section 22.212: Approval of Water Supplies, has been moved from §22.303 and renumbered §22.212. This section retains all of the requirements from §22.303 and adds a new Certificate of Approval to Operate requirement that is dependent upon the capacity development review. §22.212 A, remains the same as the previous §22.303. §22.212 B, requires that all new community and non-transient non-community public water systems commencing operation after October 1, 1999 demonstrate technical, managerial, and financial capacity to operate in compliance with the “State of Delaware Regulations Governing Public Drinking Water Systems.”

#### SECTION 22.1 DEFINITIONS

22.101 "Action Level" means the concentration of lead or

copper in water specified in Section 22.607A1a & b which determines, in some cases, the treatment requirements contained in Section 22.607 that a water system is required to complete.

22.102 "**Alpha Particle**" means a particle identical with a helium nucleus, emitted from the nucleus of a radioactive element.

22.103 "**Approved**" means approved by the Division.

22.104 "**Best Available Technology (BAT)**" means the best technology, treatment techniques, or other means which the Division finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking cost into consideration). For the purposes of setting maximum contaminant levels for synthetic organic chemicals, any BAT must be at least as effective as granular activated carbon.

22.105 "**Beta Particle**" means a particle identical with an electron, emitted from the nucleus of a radioactive element.

22.106 "Capacity" means the overall capability of a water system to reliably produce and deliver water meeting all national primary drinking water regulations. Capacity encompasses the technical, managerial, and financial capabilities that will enable a water system to plan for, achieve, and maintain compliance with applicable drinking water standards.

Technical Capacity refers to the physical infrastructure of the water system, including but not limited to, the adequacy of the source water, infrastructure (source, treatment, storage, and distribution), and the ability of system personnel to implement the requisite technical knowledge.

Managerial Capacity refers to the management structure of the water system, including but not limited to ownership accountability, staffing and organization, and effective linkages.

Financial Capacity refers to the financial resources of the water system, including but not limited to revenue sufficiency and fiscal controls.

22.106.7 "**Coagulation**" means a process using coagulant chemicals and mixing by which colloidal and suspended materials are de-stabilized and agglomerated into flocs.

22.107.8 "**Coliform Group**" means all organisms considered in the coliform group as set forth in the current edition of Standard Methods for the Examination of Water and Waste Water prepared and published jointly by the American Public Health Association, American Water Works Association and Water Pollution Control Federation.

22.108.9 "**Compliance Cycle**" means the nine-year calendar year cycle during which public water systems must monitor. Each compliance cycle consists of three three-year compliance periods. The first calendar year cycle begins January 1, 1993 and ends December 31, 2001; the second begins January 1, 2002 and ends December 31, 2010, the third begins January 1, 2011 and ends December 31, 2019.

22.109.10 "**Compliance Period**" means a three-year calendar year period within a compliance cycle. Each compliance cycle has three three-year compliance periods. Within the first compliance cycle, the first compliance period runs from January 1, 1993 to December 31, 1995; the second from January 1, 1996 to December 31, 1998, and the third from January 1, 1999 to December 31, 2001.

22.109.11 "**Confluent Growth**" means a continuous bacterial growth covering the entire filtration area of a membrane filter, or a portion thereof, in which bacterial colonies are not discrete.

22.111.12 "**Consecutive Water Supply**" means a public water system that obtains all of its water from, but is not owned or operated by, a public water system to which such Regulations apply and alters the purchased water by some type of treatment, resells the purchased water to its customer, or furnishes water to an interstate carrier. The Division may opt to accept a consecutive supply as a single system for monitoring purposes.

22.112.13 "**Contaminant**" means any physical, chemical, biological or radiological substance or matter in water.

22.113.14 "**Conventional Filtration Treatment**" means a series of processes including coagulation, flocculation, sedimentation and filtration resulting in substantial particulate removal.

22.114.15 "**Corrosion Inhibitor**" means a substance capable of reducing the corrosivity of water toward metal plumbing materials, especially lead and copper, by forming a protective film on the interior surface of those materials.

22.115.16 "**CT or CTcalc**" means the product of the residual disinfectant concentration (C) (22.161) in milligrams per liter (mg/L) determined before or at the first customer, and the corresponding disinfectant contact time (T) (22.120) in minutes, i.e. "C" X "T". If a public water system applies disinfectants at more than one (1) point prior to the first customer, it must determine the CT of each disinfectant sequence before or at the first customer to determine the total percent inactivation or total inactivation ratio. In determining the total inactivation ratio, the public water system must determine the residual disinfectant

concentration of each disinfection sequence and corresponding contact time before any subsequent disinfection application point(s). CT<sub>99.9</sub> is the CT value required for 99.9 percent (3-log) inactivation of Giardia lamblia cysts. The inactivation ratio is the CT<sub>calc</sub> divided by the CT<sub>99.9</sub> and the total inactivation ratio is the sum of the inactivation ratios for each disinfection sequence. A total inactivation ratio equal to or greater than 1.0 is assumed to provide a 3-log inactivation of Giardia lamblia cysts.

22.146 17 "**Diatomaceous Earth Filtration**" means a process resulting in substantial particulate removal in which a precoat cake of diatomaceous earth filter media is deposited on a support membrane (septum), and while the water is filtered by passing through the cake on the septum, additional filter media known as body feed is continuously added to the feed water to maintain the permeability of the filter cake.

22.147 18 "**Direct Filtration**" means a series of processes including coagulation and filtration but excluding sedimentation resulting in substantial particulate removal.

22.148 19 "**Direct Responsible Charge**" means accountability for and performance of active, daily, on-site operational duties.

22.149 20 "**Disinfectant**" means any oxidant, including but not limited to chlorine, chlorine dioxide, chloramines, and ozone added to water in any part of the treatment or distribution process, that is intended to kill or inactivate pathogens (disease causing organisms).

22.120 21 "**Disinfectant Contact Time (T)**" means the time in minutes that it takes for water to move from the point of disinfectant application or the previous point of disinfectant residual measurement to a point before or at the point where residual disinfectant concentration (C) is measured. Where only one (1) "C" is measured, "T" is the time in minutes that it takes for water to move from the point of disinfectant application to a point before or at where residual disinfectant concentration (C) is measured. Where more than one (1) "C" is measured, "T" is for the first measurement of "C", the time in minutes that it takes for water to move from the first or only point of disinfectant application to a point before or at the point where the first "C" is measured and for subsequent measurements of "C", the time in minutes that it takes for water to move from the previous "C" measurement point to the "C" measurement point for which the particular "T" is being calculated. Disinfectant contact time in pipelines must be calculated based on plug flow by dividing the internal volume of the pipe by the maximum hourly flow rate through that pipe. Disinfectant contact time within mixing basins and storage reservoirs must be determined by tracer

studies or an equivalent demonstration.

22.121 22 "**Disinfection**" means a process which inactivates pathogenic organisms in water by chemical oxidants or equivalent agents.

22.122 23 "**Division**" means the Division of Public Health of the Department of Health and Social Services established by Title 29, Section 7904 (a), Delaware Code.

22.123 24 "**Domestic or Other Non-Distribution System Plumbing Problem**" means a coliform contamination problem in a public water system with more than one (1) service connection that is limited to the specific service connection from which the coliform positive sample was taken.

22.124 25 "**Dose Equivalent**" means the product of the absorbed dose from ionizing radiation and such factors as account for differences and biological effectiveness due to the type of radiation and its distribution in the body as specified by the International Commission on Radiological Units and Measurements.

22.125 26 "**Dwelling Unit**" means one or more rooms arranged for the use of one or more individuals as a single housekeeping unit with cooking, living, sanitary and sleeping facilities.

22.126 27 "**Effective Corrosion Inhibitor Residual**" means a concentration sufficient to form a passivating film on the interior walls of a pipe.

22.127 28 "**Emergency Situation**" means a condition in which the specific provisions of these Regulations cannot be met for a temporary period and which necessitates immediate action because of the potential danger to public health.

22.128 29 "**Exemption**" means an allowance to deviate from or to exceed a maximum contaminant level requirement or treatment technique requirement for a specific period of time (see Section 22.203). In order for a system to qualify for an exemption, the system must be in operation on the date of adoption of any maximum contaminant level or treatment technique requirement.

22.129 30 "**Filtration**" means a process for removing particulate matter from water by passage through porous media.

22.130 31 "**First Draw Sample**" means a one (1) liter sample of tap water, collected in accordance with Section 22.607G2b, that has been standing in plumbing pipes at least

six (6) hours and is collected without flushing the tap.

22.131 32 "**Flocculation**" means a process to enhance agglomeration or collection of smaller floc particles into larger, more easily settleable particles through gentle stirring by hydraulic or mechanical means.

22.132 33 "**Gross Alpha Particle Activity**" means the total radioactivity due to alpha particle emission as inferred from measurements on a dry sample.

22.133 34 "**Gross Beta Particle Activity**" means the total radioactivity due to beta particle emission as inferred from measurements on a dry sample.

22.134 35 "**Ground Water Under the Direct Influence of Surface Water**" means any water beneath the surface of the ground with significant occurrence of insects or other microorganisms, algae, or large diameter pathogens such as *Giardia lamblia*, or significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH which closely correlate to climatological or surface water conditions. Direct influence must be determined for individual sources in accordance with criteria established by the Division. The Division determination of direct influence may be based on site specific measurements of water quality and/or documentation of well construction characteristics and geology with field evaluation.

22.135 36 "**Halogen**" means one of the chemical elements chlorine, bromine or iodine.

22.136 37 "**Health Hazard**" means any condition, device or practice in the water supply system or its operation which creates, or may create, a danger to the health and well-being of the water consumer.

22.137 38 "**Initial Compliance Period**" means the first full three-year compliance period which begins at least 18 months after promulgation, except for the following contaminants: Dichloromethane; 1,2,4-Trichlorobenzene; 1,1,2-Trichloroethane; Benzo[a]pyrene; Dalapon; Di(2-ethylhexyl) adipate; Di(2-ethylhexyl) phthalate; Dinoseb; Diquat; Endothall; Endrin; Glyphosate; Hexachlorobenzene; Hexachlorocyclopentadiene; Oxamyl (Vydate); Picloram; Simazine; 2,3,7,8-TCDD (Dioxin); Antimony; Beryllium; Cyanide; Nickel; and Thallium, initial compliance period means the first full three-year compliance period after promulgation for systems with 150 or more service connections (January 1993 - December 1995) and first full three-year compliance period after the effective date of regulation (January 1996 - December 1998) for systems having fewer than 150 service connections.

22.138 39 "**Large Water System**" means a water system that serves more than 50,000 persons.

22.139 40 "**Lead Service Line**" means a service line made of lead which connects the water main to the building inlet and any lead pigtail, gooseneck or other fitting which is connected to such lead line.

22.140 41 "**Legionella**" means a genus of bacteria, some species of which have caused a type of pneumonia called Legionnaires Disease.

22.141 42 "**Man-Made Beta Particle and Photon Emitters**" means all radionuclides emitting beta particles and/or photons listed in Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides in Air or Water for Occupational Exposure, NBS Handbook 69, except the daughter products of thorium 232, uranium 235 and uranium 238.

22.142 43 "**Maximum Contaminant Level (MCL)**" means the maximum permissible level of a contaminant in water which is delivered to any user of a public water system.

22.143 44 "**Maximum Total Trihalomethane Potential (MTP)**" means the maximum concentrations of total trihalomethanes produced in a given water containing a disinfectant residual after seven days at a temperature of 25oC or above.

22.144 45 "**Medium Size Water System**" means a water system that serves greater than 3,300 and less than or equal to 50,000 persons.

22.145 46 "**Minor Monitoring Violation**" means the failure of a public water system to collect all required water samples or the failure to follow the prescribed sampling procedure within the prescribed time frame.

22.146 47 "**Near the First Service Connection**" means at one (1) of the twenty (20) percent of all service connections in the entire system that are nearest the water supply treatment facility, as measured by water transport time within the distribution system.

22.147 48 "**Optimal Corrosion Control Treatment**" means the corrosion control treatment that minimizes the lead and copper concentrations at users' taps while insuring that the treatment does not cause the water system to violate any national primary drinking water regulations.

22.148 49 "**Person**" means any corporation, company, association, firm, municipally owned water utility, partnership, society and joint stock company, as well as any

individual.

22.149.50 "**Picocurie (pCi)**" means the quantity of radioactive material producing 2.22 nuclear transformations per minute.

22.150.51 "**Point of Disinfectant Application**" means the point where the disinfectant is applied and water downstream of that point is not subject to recontamination by surface water runoff.

22.151.52 "**Point of Entry Treatment Device**" means a treatment device applied to the drinking water entering a house or building for the purpose of reducing contaminants in the drinking water distributed throughout the house or building.

22.152.53 "**Point of Use Treatment Device**" means a treatment device applied to a single tap used for the purpose of reducing contaminants in the drinking water at that one (1) tap.

22.153.54 "**Pollution**" means the presence of anything in water which tends to degrade its quality so as to constitute a health hazard or impair the usefulness of the water.

22.154.55 "**Potable Water**" means water which is in compliance with all of the required drinking water standards specified in these Regulations, and is acceptable for human consumption.

22.155.56 "**Primary Maximum Contaminant Level (PMCL)**" means an MCL which involves a biological, chemical or physical characteristic of drinking water that may adversely affect the health of the consumer. This includes the MCLs for: coliform bacteria (includes total coliform and *E.coli*); antimony; arsenic; asbestos; barium; beryllium; cadmium; chromium; cyanide; fluoride; lead; mercury; nickel; nitrates; nitrites; total nitrate/nitrite selenium; thallium; turbidity; alachlor; aldicarb; aldicarb sulfone; aldicarb sulfoxide; atrazine; benzo (a) pyrene; carbofuran; chlordane; dalapon; di(2-ethylhexyl) adipate; di(2-ethylhexyl) phthalate; dibromochloropropane; dinoseb; diquat; 2,4-D; endothall; endrin; ethylenedibromide (EDB); glyphosate; heptachlor; heptachlor expoxide; hexachlorobenzene; hexachlorocyclopentadiene; lindane; methoxychlor; oxamyl (vydate); pentachlorophenol; picloram; polychlorinated biphenyls (PCBs); simazine; 2,3,7,8-TCDD (Dioxin); toxaphene; 2,4,5-TP silvex; total trihalomethanes; benzene; carbon tetrachloride; o-dichlorobenzene; p-dichlorobenzene; 1,2-dichloroethane, 1,1-dichloroethylene; cis-1,2-dichloroethylene; trans-1,2-dichloroethylene; dichloromethane; 1,2-dichloropropane; ethylbenzene; monochlorobenzene; styrene;

tetrachloroethylene; toluene; 1,2,4-trichlorobenzene; 1,1,1-trichloroethane; 1,1,2-trichloroethane; trichloroethylene; vinyl chloride; total xylenes and radioactivity (see Section 22.9).

22.156.57 "**Protection by Adequate Construction, Treatment and Supervision**" means:

A. Works which are of adequate capacity to meet the maximum demands without creating health hazards and which are located, designed and constructed to eliminate or prevent pollution.

B. Any one or any combination of the controlled processes of coagulation, sedimentation, absorption, filtration, disinfection or other processes appropriate to the sources of supply, which produce a water consistently meeting the requirements of these Regulations.

C. Conscientious operation of a public water supply by an individual in direct responsible charge who is acceptable to the Division, and meets the certification requirements of the Division at such time as these requirements are established.

22.157.58 "**Public Water System (PWS)**" means a water supply system for the provision to the public of water for human consumption through pipes or other constructed conveyances either directly from the user's free flowing outlet or indirectly by the water being used to manufacture ice, foods and beverages or that supplies water for potable or domestic purposes for consumption in more than three dwelling units, or furnishes water for potable or domestic purposes to employees, tenants, members, guests or the public at large in commercial offices, industrial areas, multiple dwellings or semi-public buildings including, but without limitation, rooming and boarding houses, motels, tourist cabins, mobile home parks, restaurants, hospitals and other institutions, or offers any water for sale for potable domestic purposes. Public water systems are classified as follows:

A. "Community Water System (CWS)" means a public water system which serves at least fifteen (15) service connections used by year-round residents or regularly serves at least twenty-five (25) year-round residents;

B. "Non-Transient Non-Community Water System (NTNCWS)" means a public water system that is not a community water system and that regularly serves at least twenty-five (25) of the same persons over six (6) months per year;

C. "Non-Community Water System (NCWS)" means a public water system which has at least fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year;

D. "Miscellaneous Public Water System (MPWS)" means a public water system that is neither

community, non-community nor non-transient non-community.

22.158 59 "**Radioactivity**" means the spontaneous, uncontrollable disintegration of the nucleus of an atom with the emission of particles and rays.

22.159 60 "**Rem**" means the unit of dose equivalent from ionizing radiation to the total body or any internal organ or organ system. A millirem is one one-thousandth (1/1000) of a rem.

22.160 61 "**Repeat Compliance Period**" means any subsequent compliance period after the initial compliance period.

22.164 62 "**Residual Disinfectant Concentration (C)**" means the concentration of disinfectant measured in mg/L in a representative sample of water.

22.162 63 "**Sanitary Survey**" means a review of the water source, facilities, equipment, operation and maintenance of a public water system for the purpose of: evaluating the adequacy of such source, facilities, equipment, operation and maintenance for producing and distributing potable drinking water; or updating the inventory information. Sanitary surveys are classified as follows:

- A. Class 1 - on-site review.
- B. Class 2 - telephone review.

22.163 64 "**Secondary Maximum Contaminant Level (SMCL)**" means an MCL which involves a biological, chemical or physical characteristic of water that may adversely affect the taste, odor, color or appearance (aesthetics), which may thereby affect public confidence or acceptance of the drinking water. This includes the MCLs for aluminum, chloride, color, copper, corrosivity, foaming agents, iron, manganese, odor, pH, silver, sulfate, total dissolved solids and zinc.

22.164 65 "**Secretary, Delaware Health and Social Services**" means the agency defined in Title 29, Section (b), Delaware Code.

22.165 66 "**Sedimentation**" means a process for removal of solids before filtration by gravity or separation.

22.166 67 "**Service Connection**" means a water line to a dwelling unit or building.

22.167 68 "**Service Line Sample**" means a one (1) liter sample of water collected in accordance with Section 22.607G2c that has been standing for at least six (6) hours in a service line.

22.168 69 "**Single Family Structure**" means a building constructed as a single family residence that is currently used as either a residence or a place of business.

22.169 70 "**Slow Sand Filtration**" means a process involving passage of raw water through a bed of sand at low velocity (generally less than 0.4 meters per hour) resulting in substantial particulate removal by physical and biological mechanisms.

22.170 71 "**Small Water System**" means a water system that served 3,300 persons or fewer.

22.174 72 "**Source**" means the place from which a system obtains its water. This may be either from underground or from the surface. Surface water may include rivers, lakes, reservoirs, springs, impoundments or a body of water with a surface exposed to the atmosphere.

22.172 73 "**Standard Sample**" means the sample size for bacteriological testing and shall consist of:

A. For the fermentation tube test, five (5) standard portions of either twenty (20) milliliters (ml) or one hundred (100) mL.

B. For the membrane filter technique, not less than one hundred (100) mL.

22.173 74 "**Supplier of Water**" means any person who owns or operates a public water system.

22.174 75 "**Surface Water**" means all water which is open to the atmosphere and subject to surface runoff.

22.175 76 "**System with a Single Service Connection**" means a system which supplies drinking water to consumers via a single service line.

22.176 77 "**Too Numerous to Count**" means that the total number of bacterial colonies exceeds two hundred (200) on a forty-seven (47) millimeter (mm) diameter membrane filter used for coliform detection.

22.177 78 "**Total Coliform-Positive Sample**" means any Presence-Absence (P-A) Coliform Test with a result of present (P), any Minimal Medium ONPG-MUG (MMO-MUG) Test with a result of P, any Membrane Filter Technique test with a result of one (1) or more colonies per one hundred (100) ml, or any Multiple Tube Fermentation test with a result of one (1) or more positive tubes.

22.178 79 "**Total Trihalomethanes (TTHMs)**" means the sum of the concentration in milligrams per liter of trihalomethane compounds [trichloromethane (chloroform), dibromochloromethane, bromodichloromethane and

tribromomethane (bromoform)] rounded to two significant figures.

22.179 ~~80~~ **"Treatment Technique Requirement"** means a requirement which specifies for a contaminant a specific treatment technique(s) demonstrated to the satisfaction of the Division to lead to a reduction in the level of such contamination sufficient to comply with these Regulations.

22.180 ~~81~~ **"Trihalomethanes (THMs)"** means one of the family of organic compounds, named as derivatives of methane, wherein three (3) of the four (4) hydrogen atoms in methane are each substituted by a halogen atom in the molecular structure.

22.181 ~~82~~ **"Turbidity"** means a measure of the clarity or cloudiness of water in Nephelometric Turbidity Units (NTUs).

22.182 ~~83~~ **"Variance"** means an allowance to deviate from or to exceed an MCL requirement or treatment technique requirement when necessary treatment techniques are not available (see Section 22.202).

22.183 ~~84~~ **"Virus"** means a virus of fecal origin which is infectious to humans by waterborne transmission.

22.184 ~~85~~ **"Vulnerable"** means subject to contamination, a determination which shall be made by the Division based on previous monitoring results, the number of persons served by the public water system, the proximity of a smaller system to a larger system, the proximity to commercial or industrial use, disposal or storage of volatile synthetic organic compounds (VOCs), and the protection of the water source(s).

22.185 ~~86~~ **"Waterborne Disease Outbreak"** means the significant occurrence of an acute infectious illness, epidemiologically associated with the ingestion of water from a public water system which is deficient in treatment, as determined by the Division.

22.186 ~~87~~ **"Water Distribution System"** means the pumps, piping and storage facilities from the source(s)/treatment plant to the property line of the ultimate consumer.

22.187 ~~88~~ **"Water Supply System"** means the structures, equipment and appurtenances for collection, treatment, storage and distribution of potable water from the source of supply to the free-flowing outlet of the ultimate consumer.

#### SECTION 22.2 GENERAL PROVISIONS

22.201 **"Application"**: These regulations shall apply to all

public water systems in the State of Delaware.

#### 22.202 **"Variance"**:

A. The Secretary, Delaware Health and Social Services may grant one or more variances to any PWS from:

1. Any requirement respecting a MCL of an applicable primary or secondary drinking water requirement upon finding that:

a. Because of characteristics of the raw water sources which are reasonably available to the system, the system cannot meet the requirements respecting the MCLs of such drinking water regulations despite application of the best technology, treatment techniques or other means, which the Secretary, Delaware Health and Social Services finds are generally available (taking costs into consideration) and;

b. The granting of a variance will not result in an unreasonable risk to the health of persons served by the PWS.

2. Any requirement of a specified treatment technique of an applicable primary or secondary drinking water requirement upon a finding that the PWS applying for the variance has demonstrated that such treatment technique is not necessary to protect the health of persons because of the nature of the raw water source of such system.

B. A supplier of water may request the granting of variance for a PWS by submitting a written request to the Secretary, Delaware Health and Social Services. Suppliers of water may submit a joint request for variances when they seek similar variances under similar circumstances. Any written request for a variance or variances shall include the following information:

1. The nature and duration of the variance requested;

2. Relevant analytical results of water quality sampling of the system, including results of relevant tests conducted pursuant to the requirements of the PMCLs;

3. For any request made under this Section, the following is required:

a. Explanation in full and evidence of the best available treatment technology and techniques.

b. Economic and legal factors relevant to ability to comply.

c. Analytical results of raw water quality relevant to the variance requested.

d. A proposed compliance schedule, including the date each step toward compliance will be achieved. Such schedule shall include as a minimum the following dates:

1. Date by which arrangement for alternative raw water source or improvement of existing raw water source will be completed.

2. Date of initiation of the connection of the alternative raw water source of

improvement of existing raw water source will be completed.

3. Date by which final compliance is to be achieved.

e. A plan for the provision of safe drinking water in the case of an excessive rise in the contaminant level for which the variance is requested.

f. A plan for interim control measures during the effective period of variance.

4. A statement that the water supplier will perform monitoring and other reasonable requirements prescribed by the Secretary, Delaware Health and Social Services as a condition to the variance.

5. Other information, if any, believed to be pertinent by the applicant, or such information as the Secretary, Delaware Health and Social Services may require.

C. The Secretary, Delaware Health and Social Services shall notify the applicant in writing of the disposition of the variance request within ninety (90) days of receipt of request.

1. If the Secretary, Delaware Health and Social Services decides to deny the application for a variance, it shall notify the applicant of its intention to issue a denial. Such notice shall include a statement of reasons for the proposed denial, and shall offer the applicant an opportunity to present, within thirty (30) days of receipt of the notice, additional information or argument to the Secretary, Delaware Health and Social Services. It shall make a final determination on the request within thirty (30) days after receiving any such additional information or argument. If no additional information or argument is submitted by the applicant, the application shall be denied.

2. If the Secretary, Delaware Health and Social Services proposes to grant a variance request submitted pursuant to this Section, it shall notify the applicant of its decision in writing. Such notice shall identify the variance, the facility covered and conditions of the variance and shall specify the period of time for which the variance will be effective.

D. No variances from the requirements of Section 22.51 (Microbiological requirements) shall be permitted.

E. No variances from the requirements of Section 22.10 (Surface Water Treatment Rule) shall be permitted.

### 22.203 "Exemption"

A. The Secretary, Delaware Health and Social Services may exempt any PWS from:

1. Any requirement respecting an MCL or any treatment technique requirement or from both, of an applicable primary drinking water regulation upon finding that:

a. Due to compelling factors (which may include economic factors) the PWS is unable to comply with such contaminant level or treatment technique requirement;

b. The PWS was in operation on the effective date of such contaminant level or treatment technique requirement and;

c. The granting of the exemption will not result in an unreasonable risk to health.

B. A supplier of water may request the granting of any exemption by submitting a request in writing to the Secretary, Delaware Health and Social Services. Suppliers of water may submit a joint request for exemptions when they seek similar exemptions under similar circumstances. Any written request for an exemption or exemptions shall include the following information:

1. The nature and duration of the exemption requested.

2. Relevant analytical results of water quality sampling of the system, including result of relevant tests conducted pursuant to the requirements of the Regulations.

3. Explanation of the compelling factors such as time or economic factors which prevent such system from achieving compliance.

4. A proposed compliance schedule, including the date when each step toward compliance will be achieved.

5. Other information, if any, believed to be pertinent by the applicant or such information as the Secretary, Delaware Health and Social Services may require.

C. The Secretary, Delaware Health and Social Services shall notify the applicant in writing of the disposition of the exemption request within ninety (90) days of receipt of request.

1. If the Secretary, Delaware Health and Social Services decides to deny the application for exemption, it shall notify the applicant of its intention to issue a denial. Such notice shall include a statement of reasons for the proposed denial, and shall offer the applicant an opportunity to present within thirty (30) days of receipt of the notice additional information or argument to the Secretary, Delaware Health and Social Services. It shall make a final determination on the request within thirty (30) days after receiving any such additional information or argument. If no additional information or argument is submitted by the applicant, the application shall be denied.

2. If the Secretary, Delaware Health and Social Services grants an exemption request submitted pursuant to this Section, it shall notify the applicant of its decision in writing. Such notice shall provide that the exemption will be terminated when the system comes into compliance with the applicable regulations, and may be terminated upon a finding by the Secretary, Delaware Health and Social Services that the system has failed to comply with any requirements of a final schedule.

a. The Secretary, Delaware Health and Social Services shall propose a schedule for:

1. Compliance (including

increments of progress) by the public water system with each contaminant level requirement and treatment technique requirement covered by the exemption and;

2. Implementation by the public water system of such control measures as the Secretary, Delaware Health and Social Services may require for each contaminant covered by the exemption.

b. The schedule shall be prescribed by the Secretary, Delaware Health and Social Services within one (1) year after the granting of the exemption subsequent to provision of opportunity for hearing pursuant to Section 22.205. An exemption from a MCL or a treatment technique requirement if granted to a PWS is done so for a specific period of time. If any of the MCLs or treatment technique requirements are revised, then all exemptions from these revised standards shall terminate seven (7) years from the effective date of revision for single PWSs and nine (9) years for regional PWSs.

D. No exemptions from the requirements of Section 22.51 (Microbiological requirements) shall be permitted.

E. No exemptions from the requirements of Section 22.10 (Surface Water Treatment Rule) shall be permitted.

#### 22.204 **Variations and Exemptions from MCLs for VOCs**

A. The Division hereby identifies the following as the best technology, treatment techniques, or other means available for achieving compliance with the MCLs for VOCs: removal using packed tower aeration; removal using granular activated carbon (except for Vinyl Chloride), removal using oxidation or other method(s) approved by the Division. See Section 22.63 for a listing of the best available technologies.

B. The Division shall require CWSs and NTNCWSs to install and/or use any of the treatment methods identified in paragraph A of this Section as a condition for granting a variance or exemption except as provided in paragraph C of this Section. If, after the system's installation of the treatment method, the system cannot meet the MCL, the system shall be eligible for a variance or exemption under the provisions of Section 22.202 or 22.203 respectively.

C. If a system can demonstrate through comprehensive engineering assessments, which may include pilot plant studies, that the treatment methods identified in paragraph A of this Section would only achieve a minimal reduction in the contaminants, the Division may issue a schedule of compliance that requires the system being granted the variance or exemption to examine other treatment methods as a condition of obtaining the variance or exemption.

D. If the Division determines that a treatment

method identified in paragraph C of this Section is technically feasible, the Division may require the system to install and/or use that treatment method in connection with a compliance schedule issued under the provisions of Section 22.202 or 22.203. The Division's determination shall be based on studies by the system and other relevant information.

22.205 **Public Hearing:** Before a variance or exemption granted pursuant to Sections 22.202 and 22.203 may take effect, the Secretary, Delaware Health and Social Services shall provide notice and opportunity for public hearing on the variance or exemption. A notice given pursuant to the preceding sentence may cover the granting of more than one variance or exemption and hearing held pursuant to such notice shall include each of the variances and exemptions covered by the notice. Public notice of an opportunity for hearing on a variance or exemption shall be circulated in a manner designed to inform interested and potentially interested persons of the proposed variance or exemption. Notification shall include posting of a notice in the principal post office of each municipality or area served by the PWS and publishing of a notice in a newspaper or newspapers of general circulation in the area served by the PWS. Such notice shall include a summary of the proposed variance or exemption and shall inform interested persons that they may request a public hearing on the proposed variance or exemption. Requests must be submitted in writing to the Secretary, Delaware Health and Social Services within thirty (30) days after issuance of the public notices. Information needed in the formal hearing request will be listed on the public notice. Upon receipt of one or more formal hearing requests, the Secretary, Delaware Health and Social Services will give notice as set forth in this Section, of any hearings to be held. Notice shall also be sent to the person or persons requesting the hearing. Notice shall include pertinent information on the subject to be covered along with dates, times and telephone numbers of agencies and people involved. The disposition of the variance or exemption shall become effective thirty (30) days after notice of opportunity for hearing is given, if no request for hearing submitted and the Secretary, Delaware Health and Social Services does not determine to hold a public hearing on its own motion.

22.206 **Right of Entry:** The Director of the Division or his/her designee shall have the right of entry, during reasonable hours and in a reasonable manner and without fee or hindrance, for the purpose of conducting a sanitary survey and/or sampling of any public water supply and all water furnished by any public water supplier, whether or not the Division has evidence that the system is in violation of an applicable legal requirement.

22.207 **Prohibiting Water Usage:** The Division may

prohibit the use of sources of water which after treatment do not provide water conforming to the standards established by these Regulations or which for any reason may pose a threat to the public's health.

22.208 **Separability:** If any provision of these Regulations is held invalid, such invalidity shall not affect other provisions which can be given effect without the invalid provision.

22.209 **Enforcement of Regulations:** All PWSs must be operated in compliance with the requirements as set forth in these Regulations.

A. Notice: Whenever the Director of the Division, or his/her appointed representative, has reason to believe that a violation of any of these Regulations has occurred or is occurring, the Division shall notify the alleged violator. Such notice shall be in writing, may be sent by Certified Mail, or hand delivered, shall cite the Regulation or Regulations that are allegedly being violated, and shall state the facts which form the basis for believing that the violation has occurred or is occurring.

B. Orders: Notice of a violation may be accompanied by an order that requires that certain corrective action be taken. The order shall be signed by the Director or his/her designee or any of his/her appointed representatives and may require:

1. The immediate cessation or correction of the violation.
2. The acquisition or use of additional equipment, supplies or personnel to insure that the violation does not recur.
3. The submission of a plan to prevent future violations to the Division for review and approval.
4. The submission of an application for a variance or exemption.
5. Any other corrective action deemed necessary for proper compliance with the Regulations including interim remedies pending correction of violations.

C. Hearing Request: Any supplier of water who receives an order from the Division may submit a request for a hearing to the Secretary, Delaware Health and Social Services to contest the order.

D. Compliance with Effective Orders: Should any public water supplier fail to comply with any of these Regulations, the Secretary, Delaware Health and Social Services may apply to an appropriate court for an injunction or other legal process to prevent or stop any practice which is in violation of these regulations.

E. Penalties: The Secretary, Delaware Health and Social Services shall have the authority to impose an administrative penalty upon any public water system that violates water quality standards pursuant to Title 16, Chapter 1, § 122(3)(C). The administrative penalty shall be as

follows:

1. For systems serving a population of more than 10,000 people, not less than \$1,000 nor more than \$10,000 per day per violation; and
2. For any other system, the administrative penalty shall be not less than \$100 nor more than \$10,000 per day per violation.

22.210 **Emergency Orders:** The Director of the Division or his/her appointed representative may issue emergency orders in any case where there is an imminent danger to the health of the public resulting from the operation of any waterworks or the source of a water supply. An emergency order may be communicated by the best practical notice under the circumstances, and is effective immediately upon receipt. The order may state any requirements necessary to remove the danger to the health of the public, including the immediate cessation of the operation of the PWS. Emergency orders shall be effective for a period not exceeding sixty (60) days at the determination of the Director of the Division or his/her representative. Should any public water supplier fail to comply with an emergency order, the Secretary, Delaware Health and Social Services may apply to an appropriate court for an injunction or other legal process to prevent or stop any practice which is in violation of these Regulations.

22.211 **Plans and Specifications:**

A. No person shall construct a new Public Water System or alter an existing Public Water System or alter an existing PWS until two (2) copies of plans and specifications have been submitted to and approved by the Division without a Certificate of Approval for Construction. Whenever it is discovered that either of the above are occurring without such approval, the Director of the Division may order the owner, supplier of water or contractor to immediately stop the work and submit plans and specifications to the Division. After the submittal, any part of the system that has already been installed and is not in compliance shall be removed, altered or replaced in order to achieve compliance. Plans and specifications shall be on paper no larger than 30" x 42". Within thirty (30) days of receipt of plans and specifications, the Division shall notify the person who submitted the plans and specifications if they have been approved or disapproved. Such notice shall specify any conditions of approval or any reasons for disapproval. Approvals are valid for one (1) year and construction shall begin within that time. All construction shall be in accordance with the approved plans and all conditions listed in the Certificate of Approval.

1. Systems shall submit two (2) copies of plans and specifications. Plans shall be developed utilizing the latest edition of Ten States Standards, NSF Standards, or approved equivalent and other technical information as

required by the Division.

2. Construction shall be in accordance with the approved plans and all conditions listed in the Certificate of Approval to Construct.

3. Whenever it is discovered that either of the above are occurring without such approval, the Director of the Division may order the owner, supplier of water or contractor to immediately stop the work and submit plans and specifications to the Division. After the submittal, any part of the system that has already been installed and is not in compliance shall be removed, altered or replaced in order to achieve compliance. Plans and specifications shall be on paper no larger than 30" x 42". The Division shall notify the person who submitted the plans and specifications if they have been approved or disapproved. Such notice shall specify any conditions of approval or any reasons for disapproval. Approvals are valid for one (1) year. Failure to begin construction within one year of approval shall cause the Certificate of Approval for Construction to lapse and become void. All construction shall be in accordance with the approved plans and all conditions listed in the Certificate of Approval.

B. Effective October 1, 1999, all new community and non-transient non-community systems must comply with §22.211A, and, in addition, submit an Application for Capacity Development review. The plans and specifications must be prepared by a professional engineer utilizing the capacity development principles specified in §22.106.

~~22.303~~ 212 Siting Requirements Approval of Water Supplies: Before any person may enter into a financial commitment for or initiate construction of a new PWS or increase the capacity of an existing PWS, he shall notify the Division and, to the extent practicable, avoid locating part or all of the new or expanded facility at a site which:

A. Is subject to a significant risk from earthquakes, floods, fires or other disasters which could cause a breakdown of the PWS or a portion thereof or;

B. Except for intake structures, is within the floodplain of a one hundred (100) year flood or is lower than any recorded high tide where appropriate records exist.

A. No person shall operate a newly constructed public water system or renovated portion of an existing water system without a Certificate of Approval to Operate. A Certificate of Approval to Operate shall be issued by the Division to water systems which meet the following requirements:

1. Compliance with rules and regulations to prevent development of health hazards;

2. Adequate protection of the water quality throughout all parts of the system, as demonstrated by sanitary surveys;

3. Proper operation of the water supply system under the responsible charge of personnel whose

qualifications meet the certification requirements of the Division;

4. Adequate capacity to meet anticipated peak demands while maintaining not less than twenty-five (25) pounds per square inch (psi) and not more than one hundred (100) psi at ground level at all points in the water distribution system; and

5. Records of laboratory examinations showing ~~consistent~~ compliance with the water quality requirements of these Regulations.

B. Effective October 1, 1999, in addition to the requirements in §22.212A, approval of new community and non-transient non-community water systems shall be dependent upon the following:

1. A certification by a professional engineer that the system was built in accordance with approved plans and specifications and all conditions of the Certificate of Approval for Construction; and

2. Managerial and financial information as required by the Division to demonstrate compliance with Capacity Development as defined in §22.106. This information may include, but not be limited to; annual reports, water system plans or business plans, self assessments/peer reviews, criteria used by lenders, financial viability assessment methods, financial and managerial training.

3. Failure to comply with §22.212B.1 and 2 shall result in the Division denying the application for a Certificate of Approval to Operate. A new water system shall not commence operations without a Certificate of Approval to Operate.

~~22.242~~ **13 Siting Requirements:** Before any person may enter into a financial commitment for or initiate construction of a new PWS or increase the capacity of an existing PWS, he shall notify the Division and, to the extent practicable, avoid locating part or all of the new or expanded facility at a site which:

A. Is subject to a significant risk from earthquakes, floods, fires or other disasters which could cause a breakdown of the PWS or a portion thereof or;

B. Except for intake structures, is within the floodplain of a one hundred (100) year flood or is lower than any recorded high tide where appropriate records exist.

~~22.243~~ **14 Approved Laboratory:** For the purpose of determining compliance with Sections 22.5, 22.6, 22.7 and 22.9, samples may be considered only if they have been analyzed by the Division, EPA, or an approved laboratory, except that measurements for turbidity, free chlorine residual, temperature and pH may be performed by any person acceptable to the Division.

~~22.214~~ **15 Quality:** Drinking water shall not contain impurities in concentrations which may be hazardous to the health of the consumers. Substances used in its treatment shall not remain in the water in concentrations greater than required by good practice. Substances which may have deleterious physiological effects, or for which physiological effects are not known, shall not be introduced into the system in a manner which would permit them to reach the consumer.

~~22.215~~ **16 Required Sampling, Monitoring or Analyses:** In any case where the Division does not perform sampling, monitoring or analyses required by these Regulations, the supplier of water shall be responsible for performing this sampling, monitoring or analyses.

~~22.216~~ **17 Date of Effect:** These Regulations shall become effective on December 10, 1993.

#### SECTION 22.3 SOURCE AND PROTECTION

22.301 **Water Source Desirability:** Drinking water shall be obtained from the most desirable source which is feasible, and efforts must be made to prevent or control pollution of the source. If the source fails to meet the bacteriological standards of Section 22.5 and is not already disinfecting pursuant to Section 22.802, it may be required to do so in order to meet the bacteriological standards.

22.302 **Sanitary Surveys:** Sanitary surveys shall be made by the Division in order to locate and identify health hazards which might exist in the water supply system. The manner and frequency of making these surveys, and the rate at which discovered health hazards are to be removed, shall be in accordance with a program approved by the Division.

~~22.303~~ **Approval of Water Supplies:** Approval of water supplies shall be dependent in part upon:

A. ~~Enforcement of rules and regulations to prevent development of health hazards;~~

B. ~~Adequate protection of the water quality throughout all parts of the system, as demonstrated by sanitary surveys;~~

C. ~~Proper operation of the water supply system under the responsible charge of personnel whose qualifications meet the certification requirements of the Division at such time as these requirements are established;~~

D. ~~Adequate capacity to meet anticipated peak demands while maintaining not less than twenty-five (25) pounds per square inch (psi) and not more than one hundred (100) psi at ground level at all points in the water distribution system and;~~

E. ~~Records of laboratory examinations showing consistent compliance with the water quality requirements of these Regulations.~~

~~22.304~~ **4 Protection of Water:** Water delivered to every consumer by any public water supplier shall be so protected by natural means, by proper constructions or by treatment so as to consistently equal or exceed the requirements herein established.

~~22.304~~ **5 Monitoring Water Quality:** Quality of water delivered by any public water supplier shall be continuously and/or periodically monitored in accordance with requirements herein established or in accordance with such monitoring water system of equal or greater effect as may be proposed by a public water supplier for its own use, subject to Division approval.

~~22.305~~ **6 Responsibility:** For the purpose of application of these Regulations, the supplier of water shall be responsible for the water quality at the user's free flowing outlet except for turbidity and VOCs, which are measured at a representative entry point(s) to the water distribution system.

#### **DIVISION OF SOCIAL SERVICES**

Statutory Authority: 31 Delaware Code,  
Section 505 (31 Del.C. 505)

#### **PUBLIC NOTICE**

#### **Medicaid / Medical Assistance Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its eligibility manual.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to the Director, Medical Assistance Programs, Division of Social Services, P.O. Box 906, New Castle, DE 19720 by May 31, 1999.

REVISION:

Division of Social Services Eligibility Manual

14330.2 ELIGIBILITY FOR STATE FUNDED BENEFITS  
(NONQUALIFIED ALIENS)

Effective January 1, 1998, legally residing nonqualified aliens, regardless of the date of entry into the U.S., may be

found eligible for full Medicaid benefits, ~~including long term care services. This does NOT include long term care services. Legally residing nonqualified aliens may be found eligible for Medicaid long term care services upon residing in the United States for five years.~~

NEW:

#### 20620.2.2 NECESSARY MEDICAL CARE

Requests for income to be protected for necessary medical or remedial care not covered under the Medicaid plan may NOT be for a single item that costs less than \$50.00, whether billed individually or together with other items.

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### **DIVISION OF SOCIAL SERVICES**

Statutory Authority: 31 Delaware Code,  
Section 505 (31 **Del.C.** 505)

#### **PUBLIC NOTICE**

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REVISION

#### **Division of Social Services Eligibility Manual**

##### 15400.3.1 Income

Follow ABC income standards and methodologies (disregards, exclusions, allocations). ~~The child's income must not exceed the ABC payment standard for one. See DSSM 4008 for ABC policy on determining financial eligibility and using the gross and net income tests.~~ If two or more siblings are placed in the same foster care home, they must be budgeted together. In this case, the appropriate ABC standard for two or more individuals will apply.

##### 15400.3.1.1 Income at Redetermination

At redetermination, financial eligibility for IV-E children can be determined by comparing the net monthly income to the appropriate board rate or the ABC standard of need, whichever is more beneficial to the child. The board rates are changed each year in July.

For non-IV-E children, the income at time of redetermination must be less than the ABC ~~payment standard.~~ standard of need.

##### 16240 Composition of Budget Unit

The budget unit is composed of various adults who are legally/financially responsible for each other and various children (related or unrelated) for whom the adults have legal responsibility or for whom the adults have accepted parental-like responsibility.

One family and/or household may be composed of one or more budget units and an individual may belong to more than one budget unit. The budget unit must exclude any individual who is receiving SSI. Any individual who is receiving assistance under ABC, GA, Disabled Children, HCBS, QMB, SLMB, QI-1, QI-2, QDWI, or another Medicaid only group may be included or excluded from the budget unit. If the income of the individual who is receiving medical assistance under another eligibility group makes another individual ineligible, we will exclude the individual who is receiving assistance under another eligibility group.

The budget unit may be modified to exclude related individuals with income except:

- a parent is always financially responsible for the minor (under age 18) natural/adopted, non-emancipated child, or unborn child,
- a spouse is always financially responsible for a spouse,
- unmarried partners with a mutual child (child in common) are always financially responsible for the child. ~~or unborn child.~~ Neither partner is responsible for the other, even though both parents are responsible for their mutual child.

NOTE: The parent, spouse, or partner may be excluded from the poverty level budget unit if he or she is receiving assistance under another Medicaid group.

##### 16240.1 Individuals to Include

- Pregnant woman and unborn child(ren) Note: Pregnant women count as at least two family members in determining the budget unit size in all cases. If a pregnant woman is diagnosed with a multiple pregnancy, this must be verified to adjust the budget size accordingly.
- The spouse: If the income of the stepparent makes some of the stepchildren ineligible, do not count the

stepparent income. The stepparent and his or her own children remain in the budget unit.

- Unmarried partners if the couple have a child for whom they have assumed parental-like responsibility. The child and the unmarried partners will first be included in the budget unit. An unmarried partner (who is not the parent of the child) must be excluded when his or her income makes the child or the other unmarried partner ineligible.
- Include both unmarried partners when determining the eligibility of a mutual child. ~~or a mutual unborn child. The pregnant woman will count as two (or more).~~
- Other natural or adopted children under age 18 that both parents have in common. Families have the choice of including or excluding siblings. If a child has income, include the child with income in the budget unit, but do not count that child's income when determining the eligibility of the siblings, the parents, or other individuals in the budget unit. The child's income is counted when determining his or her own eligibility. Please note that the income of a child who is a minor parent is counted when determining the eligibility of his or her own child unless the income is otherwise excluded.
- Other related or unrelated children under age 18 (such as a niece, cousin, friend's child, minor sibling of adult). This is permissible because there is no technical requirement that the child be living in the home of a specified relative. If the children are ineligible in the big budget unit, place them in a separate budget unit. Include the adult sibling who has assumed parental-like responsibility for a minor sibling in the budget unit. If the income of the adult sibling renders the minor ineligible, place the minor in a separate budget unit.
- The parents of a pregnant minor living together in the same home. Do not include her parents if the pregnant minor is considered emancipated. See technical eligibility for an explanation of emancipation.

#### 16240.2 Individuals to Exclude

- Individuals who are recipients of SSI. Individuals who are recipients of ABC, GA, Disabled Children, HCBS, QMB, SLMB, QI-1, QI-2, QDWI, or another Medicaid only group may be included or excluded in the budget unit.
- Parents of the father of a baby ~~or unborn~~ when the pregnant minor's girlfriend is living there with his parents. We will include the parents of the father if he is under age 18 and is applying for Medicaid.

NOTE: If an individual is not included in the budget unit, do not include his or her income.

### **DIVISION OF SOCIAL SERVICES**

Statutory Authority: 31 Delaware Code,  
Section 505 (31 Del.C. 505)

#### **PUBLIC NOTICE**

#### **Medicaid / Medical Assistance Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its general policy manual.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to the Director, Medical Assistance Programs, Division of Social Services, P.O. Box 906, New Castle, DE 19720 by May 30, 1999.

NEW RULE:

### **ASSISTED LIVING MEDICAID WAIVER PROGRAM MANUAL**

Health care services are provided to the majority of Medicaid clients through a Managed Care Organization (MCO). However, Assisted Living Medicaid Waiver Program (ALMWP) clients are exempt from managed care coverage. Services provided to clients eligible for assisted living services will be reimbursed on a "fee-for-service" basis.

#### **I. OVERVIEW**

The Assisted Living Medicaid Waiver Program (ALMWP) is a community based residential services program administered by the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). The program is funded by the Delaware Medical Assistance Program (DMAP) and state general funds and is targeted to older persons and adults with physical disabilities who meet Medicaid nursing home admission criteria.

Assisted living is:

- The provision of housing and meals within a "homelike" environment (Medicaid does not reimburse the assisted living facility for room and board. The consumer is responsible for these

- charges).
- Services to meet an individual's needs, as identified by a standardized assessment tool and identified in the negotiated service agreement; and
- A philosophy of care which emphasizes consumer independence, choice, privacy and dignity.
- Providers who render assisted living services to eligible consumers must be licensed as an assisted living agency by the Division of Long Term Care Resident Protection. All assisted living service providers must sign a contract with DSS/Medicaid. Providers enrolled with Medicaid are assigned a unique provider number ending with "74" which will identify them as an ALMWP provider. They will also be assigned a specialty code "K1", defined as "assisted living agency".

All records maintained by the ALMWP provider shall at all times be open to inspection by the authorized representatives of the Division of Public Health (DPH), Office of Health Facilities Licensing and Certification, DSAAPD, DMAP and Long Term Care Ombudsman.

To ensure a variety of residential alternatives, the ALMWP may include the following types of settings:

- Small group homes;
- Larger residential settings;
- Designated sections of apartment buildings; and
- Housing clusters (e.g., townhouses, mobile homes).

## **II. GENERAL INFORMATION**

The ALMWP provider may bill the per diem rate for any day that the consumer is present in the assisted living agency for any part of the day.

The ALMWP provider may not bill the per diem rate for any day that the consumer is absent from the assisted living agency for the entire day.

The DMAP does not cover home health services provided to an assisted living consumer on a non-medical/social leave of absence outside of the State of Delaware.

The DMAP may cover medically necessary home health services to an assisted living consumer on a non-medical/social leave of absence within the State of Delaware. Prior authorization must be obtained through the DSAAPD nurse for nursing aide services and/or skilled nursing services.

The DMAP may cover medically necessary skilled nursing visits or private duty nursing visits in the assisted living agency. Prior authorization must be obtained through the DSAAPD nurse.

The DMAP does not cover home health aide visits in the assisted living agency. (Home health aide services provided in the assisted living agency are reimbursed as part of the ALMWP per diem rate.)

To prevent the possibility of payment for duplicate services, the DMAP will only cover the assisted living per

diem OR the hospice per diem for consumers who elect hospice coverage.

Based upon a documented change in the consumer's condition, the ALMWP provider may request a review of the monthly service rate and/or the supplemental services payment by the DSAAPD nurse. Such a review may occur no more frequently than quarterly. See Supplemental Services Payment information in Section VII of this manual.

The ALMWP provider may request approval from DSAAPD to receive the supplemental services payment no more frequently than quarterly. See Supplemental Services Payment information in Section VII of this manual.

## **III. ELIGIBILITY CRITERIA**

The ALMWP is particularly targeted to older adults and adults with physical disabilities who need assistance with the Activities of Daily Living (ADL). To be eligible for the ALMWP consumers must:

- be residents of the State of Delaware;
- be 18 years of age or older; and
- meet the financial, medical, and program eligibility criteria specified below.

All applicants must be determined medically and financially eligible for the DMAP and meet Medicaid nursing home admission criteria.

### Financial Eligibility

Financial eligibility is determined by the DSS Long Term Care Financial Unit. Applicants for the ALMWP must meet the income and assets criteria for Long Term Care Medicaid.

Any individual who is in receipt of SSI, who would be eligible for SSI if she/he were not institutionalized, or whose income is less than 250% of the SSI standard and who has resources that are less than \$2,000, and burial funds less than \$1,500 MAY be financially eligible to have Medicaid payments made on his/her behalf to the ALMWP provider.

When the application for the ALMWP has been approved, the Medicaid Financial Unit will send a notice of acceptance to the applicant, family, and ALMWP provider.

The admitting ALMWP provider will receive a notice which indicates the:

- Amount of the consumer's monthly income due to the ALMWP provider;
- Amount to be retained for medical insurance and personal needs;
- Effective date of the Medicaid coverage; and
- Consumer's Medicaid ID number (to be used for billing).

Collection of the patient pay amount from the consumer or his/her representative is the responsibility of the ALMWP provider.

If the consumer has income under the Adult Foster Care standard, there will be no patient pay amount.

#### Medical Eligibility

Medical eligibility is determined by the Pre-Admission Screening Units of either DSS or DSAAPD.

#### Program Eligibility

Program eligibility for the ALMWP will be determined by the DSAAPD. An individual must:

- Have need of an assisted living service on a regular weekly basis; and
- Be able to be maintained safely in the assisted living agency with the provision of the ALMWP services. Safety concerns must be brought to resolution through a mutually agreed upon Managed Risk Agreement.

An individual whose needs can be appropriately met solely by the use of assistive technology and/or home modifications is not eligible for the ALMWP.

The ALMWP is not appropriate for clients needing only:

- A Medicaid card.
- Housing.

An individual will not be able to enter the ALMWP unless:

- There is a unit available in an assisted living agency that can meet the consumer's needs and preferences;
- The total annual costs billed to Medicaid for assisted living and community care services are no more than the annual cost of Medicaid nursing facility care;
- The consumer, alone or with the assistance of a representative, can make decisions that allow him/her to reside safely in the community within the provision of assisted living services;
- The maximum number of clients who can be served under the ALMWP has not been reached;
- The client must participate in the eligibility determination process both with the ALMWP provider and DSAAPD. The negotiated Service Agreement and any Managed Risk Agreement must be reviewed and approved by DSAAPD.

As per 63.505 of the Delaware Regulation for Assisted Living Agencies:

The assisted living agency shall not admit any consumer who needs services which cannot be provided or arranged for by the assisted living agency. The ALMWP provider shall not provide services to a consumer who:

- Needs 24 hours nursing services or whose medical

conditions are unstable to the point that they require frequent observation, assessment and intervention by a licensed professional nurse, including unscheduled nursing services. Unless the attending physician certifies that despite the presence of this factor, the consumer's need may be safely met by a Service Agreement developed by the ALMWP provider, the attending physician, a registered nurse, the consumer or his/her representative and other appropriate health care professionals as determined by the consumer's needs;

- Is bedridden for 14 consecutive days unless a physician certifies that despite the presence of this factor, the consumer's needs may be safely met by a Services Agreement developed by the ALMWP provider, the attending physician, a registered nurse, the consumer or his/her representative and other appropriate health care professional as determined by the consumer's needs;
- Needs transfer assistance by more than one person and a mechanical device unless special staffing arrangements have been made to ensure safe care and evacuation;
- Has conditions that exceed program capabilities; or
- Presents a danger to self or others or engages in illegal drug use.

#### Approval of the Service Agreement

The Service Agreement and any Managed Risk Agreements, negotiated between the ALMWP provider and the consumer, must be completed and received by DSAAPD, at least 10 days prior to the client's entrance into the assisted living agency.

The terms of the Service Agreement and any Managed Risk Agreements, must be approved by both the DSAAPD AL/CM and the DSAAPD Nurse. The purpose of the review is to ensure that the agreement reflects the consumer's care needs of both skilled and unskilled services. The agreement should be reasonable in terms of services received for that designated monthly service rate.

The AL/CM and Nurse will signify their approval of the Service Agreement and any Managed Risk Agreements by their signatures on the Service Agreement Approval Form (Appendix B) and the Advanced Action Notice for the client.

DSAAPD will signal the provider of their approval by sending the provider:

1. The Service Agreement Approval Form.
2. The consumer's Care Plan.
3. The Advanced Action Notice for the consumer.

#### **IV. CONTENT/DESCRIPTION OF ASSISTED LIVING SERVICES**

Assisted living services include the following:

- Personal Services/Assistance with the Activities of

Daily Living (ADLs)

- Nursing Services
- Meal Services
- Social/Emotional Services
- Assistance with Instrumental Activities of Daily Living (IADLs)

Personal Services/Assistance with the Activities of Daily Living (ADLs)

Personal services/assistance with the ADLs encompass a range of interventions (supervision, minimum assistance, moderate assistance and maximum [total] assistance) to aid the consumer in the performance of one or more of the activities of daily living (e.g., ambulating, transferring, grooming, bathing, dressing, eating and toileting).

- Ambulating includes: supervision (e.g., staff person accompanies consumer with balance problems when walking, etc.); minimum, moderate or maximum assistance for consumers who need human help and/or use a cane, walker, crutches, or a wheelchair; assistance with climbing stairs; assistance with turning/positioning in bed or chair.
- Transferring includes: supervision of self-transfer; minimum, moderate or maximum assistance for consumers when moving from bed to chair (e.g., using transfer board, one person or one person plus mechanical lift, unless special staffing arrangements have been made, as specified in Regulation 63.505 of the Delaware Regulations for Assisted Living Agencies).
- Grooming includes: reminders; supervision of self-care; minimum, moderate or maximum assistance with specific tasks (e.g., shaving, shampooing, oral care, finger nails, toe nails); applying or changing non-sterile dressings.
- Bathing includes: reminders; supervision or preparation of bath when consumer bathes self; scheduling/encouragement/other appropriate interventions when consumer resists bathing regularly; minimum, moderate or maximum assistance with bathing (e.g., human or mechanical assistance to get in the tub or shower; assistance with bathing self; total bathing assistance).
- Dressing includes: reminders; supervision of consumers who dress themselves; minimum, moderate or maximum assistance with dressing (e.g., helping consumer pick out clothes; getting clothes from closet or dresser; assisting with fasteners, zippers, shoes; putting on or taking off braces/prosthetics, etc.).
- Eating includes: reminders; assistance with self-feeding (e.g., arranging food tray, opening containers, cutting food, etc.); supervision during meal time (e.g., for consumers who have difficulty

swallowing, who need to be encouraged to eat, etc.); minimum, moderate or maximum assistance for residents who need to be fed. Assistance with tube feeding is not included. It is expected that an individual requiring tube feeding would be independently responsible for this skill.

- Toileting includes: reminders; bowel and/or bladder training programs; supervision when using the toilet; minimum, moderate and maximum assistance (e.g., taking the consumer to the bathroom, helping the consumer use a bedpan or urinal, etc.); routine catheter care (e.g., reminders or supervision of consumers doing self-care, performing routine care); routine ostomy/colostomy care (e.g., reminders or supervision of consumers doing self-care, performing routine care).

Nursing services to be provided by a registered nurse [RN] or a licensed practical nurse [LPN] available in assisted living include the following:

- Routine nursing services expected to be provided directly by the assisted living agency includes assistance with medication administration,\* insulin/other injections, blood sugar monitoring; and nursing assessment.

\*Under an amendment of the Delaware Nurse Practice Act, assistance with self-administration of medications, other than by injection, may be provided by caregivers who have successfully completed a State Board of Nursing approved medication training program [24 Delaware Code, Chapter 19, Subsection 1921(a)(16)].

- Non routine nursing and therapy services may be brought into the assisted living setting with the approval of DSAAPD. These nursing and therapy services include; non-routine skilled nursing when needed on a short term or intermittent basis, or occupational, speech or physical therapy.

Such nursing and therapy services are beyond the scope of nursing services covered by the ALMWP, and may be paid for by Medicare, Medicaid, private insurance, or personal funds, as appropriate.

Meal Services

Assisted living providers are required to serve three meals per day (food costs are covered in the room and board payment). Consumer's food preferences must be considered in developing menus, and food substitutions should be available at all meals. When a consumer needs a special diet ordered for therapeutic reasons by a physician, the assisted living provider must consult with a dietitian and/or nurse in

developing special menus/appropriate substitutions to meet the consumer's needs and food preferences.

#### Social/Emotional Services

Assisted living providers that serve persons with dementia or other cognitive impairments must have the capacity to provide needed staff support, intervention and supervision to such individuals. The regulations require assisted living providers to develop policies and procedures designed to prevent cognitively impaired consumers from wandering away from safe areas (Delaware Regulations for Assisted Living Agencies, Section 63.304).

#### Assistance With Instrumental Activities of Daily Living (IADLs)

Assistance with IADLs encompasses a range of interventions (supervision, minimum assistance, moderate assistance and maximum [total] assistance) to assist the consumer in performing one or more of the IADLs. IADLs include the following specific services:

- Laundry;
- Meal preparation (consumers who wish to prepare some or all of their meals or snacks should receive needed assistance with food shopping, meal preparation and cleaning up after the meal);
- Cleaning the consumer's living unit;
- Shopping assistance;
- Making arrangements for routine or special health needs (e.g., scheduling medical appointments, reminding consumers of scheduled appointments, providing transportation to appointments);
- Money management (as specified in the service agreement and approved by DSAAPD). The assisted living provider or any of its employees may not serve as Representative Payee or in any legal capacity such as a guardian.

### **V. PROGRAM RESPONSIBILITY**

#### DSAAPD Responsibility

It is the responsibility of the DSAAPD to oversee the day-to-day operation of the ALMWP. The Division will be responsible for the following functions:

- Recruit and monitor assisted living providers;
- Furnish the assisted living provider with administrative and program guidance;
- Determine program (medical and technical) eligibility of all consumers who apply for admission to the program, upon admission to the program, and re-determine annually thereafter;
- Determine consumer's monthly service rate;
- Forward, upon the consumer's written request, the consumer's most recent assessment, level of care and anticipated monthly service rate to prospective

ALMWP providers:

- Facilitate consumer placement in the ALMWP;
- Participate (as appropriate) with the consumer and the provider in negotiating the Service Agreement. At the minimum, the Service Agreement must address the need for the following:
  1. Personal services;
  2. Nursing services;
  3. Food services;
  4. Environmental services including housekeeping, laundry, safety, trash removal;
  5. Social/emotional services including those related to cognitive deficits;
  6. Financial management services;
  7. Transportation services;
  8. Individual living unit furnishings;
  9. Notification of family when there is a change in the health status of the consumer;
  10. Assistive technology and durable medical equipment;
  11. Rehabilitation services;
  12. Qualified interpreters for people who are deaf and hard of hearing; and
  13. Reasonable accommodations for persons with disabilities.

The Service Agreement is based on the service assessment and is developed jointly by the consumer or representative, the provider and DSAAPD through negotiation. No one person unilaterally decides the content of the Service Agreement. The Service Agreement must be completed no more than 30 days prior to move-in, and must be reviewed, and, if needed, revised within 14 days of admission and at least annually by all parties named above.

- Participate (as appropriate) with the consumer and the provider in negotiating the Managed Risk Agreement. The Managed Risk Agreement is a written addendum to the Service Agreement which specifies how a situation, in which the consumer's choice or preference places the consumer at risk or is likely to lead to adverse consequences, will be handled. A Managed Risk Agreement may be negotiated in conjunction with the Service Agreement, or at any time a situation arises which is appropriate to be addressed by a Managed Risk Agreement. If a Managed Risk Agreement is made a part of the Service Agreement, it shall:

1. Clearly describe the problem, issue or service that is the subject of the Managed Risk Agreement.
2. Describe the choices available to the consumer as well as the risks and benefits associated with each choice, the ALMWP provider's recommendations or desired outcome, and the consumer's or his/her representative's desired preference.
3. Indicate the agreed upon option.

4. Describe the agreed upon responsibilities of the ALMWP provider, the consumer and any third party providers.

5. Become a part of the Service Agreement, and be signed separately by the consumer, or his/her representative, the ALMWP provider, and any third party with obligations under the Managed Risk Agreement that the third party is able to fully comprehend and perform.

6. Include a time frame for review.

- Review and approve the negotiated Service Agreement.
- Review and approve any Managed Risk Agreement.
- Prior authorize nursing aide and/or skilled nursing services or private duty nursing as described in General Information.
- If the consumer is eligible to receive a supplemental payment for services related to cognitive impairment, ensure that a family member or representative is present in Service Agreement negotiation.
- Ensure that the director and staff of the ALMWP provider meet the minimum provider standards as described in this policy.

#### DSS/Medicaid Responsibility

It is the responsibility of DSS/Medicaid to:

- Determine consumer's financial eligibility.
- Notify DSAAPD of any changes in financial eligibility.
- Furnish the ALMWP provider with Medicaid program guidance.
- Issue Medicaid policies, rules, and regulations related to the ALMWP.
- Complete appropriate file maintenance forms to keep payment rates updated in the MMIS system.
- Enroll assisted living providers.
- Process claims and reimburse providers who are enrolled with the DMAP to provide assisted living services.

#### Provider Responsibility

##### Administrative

The provider must:

- Meet and comply with all federal, state and local rules, regulations and standards that are applicable to assisted living. All ALMWP providers must be licensed and regulated by the DPH, in compliance with the Delaware Regulations for Assisted Living Agencies, adopted under Title 16, Part II, Chapter 11 of the Code of Delaware.
- Be monitored at least annually, or more frequently, if determined necessary by DSAAPD.

- Accept applicants approved by the ALMWP for placement unless the agency provides documented evidence that it does not have the capacity to serve the needs of the applicant.
- Accommodate the changing needs of consumers in the ALMWP and is expected to have the capacity to provide more assistance than the consumer needs on admission, unless the agency provides evidence that it does not have and is unable to develop such capacity, without changing the nature of the agency.
- Give clear information to the DSAAPD and to all prospective applicants for admission, regarding its limitation in providing services to meet consumer's changing needs, and criteria and procedures for discharge.
- Accept the room and board rate and the monthly service rate set by DSAAPD as payment in full for each consumer the ALMWP provider admits.
- Collect the consumer's patient pay amount.
- Notify DSAAPD and DSS regarding all consumer insurance coverage.
- Ensure that all residents and paid and volunteer staff of the assisted living agency are knowledgeable about residents' rights as specified in Delaware Regulations for Assisted Living Agencies and the "Rights of Patients," Code of Delaware, Title 16, Chapter 11, Subchapter II.
- Ensure that consumers do not waive rights guaranteed in the Delaware Regulations for Assisted Living Agencies and the "Rights of Patients," Code of Delaware, Title 16, Chapter 11, Subchapter II. Upon admission, all consumers must be given, in writing, the name, address and telephone number of the following:

1. The contact person for the ALMWP at

DSAAPD;

2. The Long Term Care Ombudsman; and

3. The DPH licensing director.

- Ensure the right of consumers to make informed choices about all aspects of their lives, and must ensure the full participation in decision-making of the consumer's representative.
- Maintain the confidentiality of the consumer's records and the discussions, which take place during the negotiation of the Service Agreement. The ALMWP provider also must recognize the right of the consumer to read or get a copy of his/her records and to give consent in writing for others to review or receive a copy of such records.
- Ensure access at any reasonable hour by representatives of DSAAPD, DPH, and DSS to individual consumers with their verbal consent and to the facility;

- Conduct service assessments. The initial service assessment must be conducted no more than 30 days prior to admission. It should be reviewed and revised, if appropriate within 14 days of admission and as frequently as needed thereafter, but no less than annually;
- Ensure that consumers who have grievances or complaints receive a timely response and that, whenever possible, consumers' grievances and complaints are resolved to his/her satisfaction. A written record of all such grievances and complaints must be maintained by the ALMWP provider. Such records are open for review by representatives of DSAAPD, DPH and DSS.

When such grievances or complaints are not resolved by the provider to the consumer's satisfaction, the provider must facilitate the ability of consumers to contact any and all of the following:

1. Service Agreement concerns should be directed to DSAAPD.
2. Service delivery concerns should be directed to DSS, the Ombudsman, and the Long Term Care Resident Protection.
3. DPH or any other agency, advocate or individual the consumer chooses to contact.

Retaliation against consumers, family members, staff or others who complain or report grievances is prohibited. Such actions will result in a referral to the Ombudsman for an investigation to determine if a violation has occurred which warrants further legal action, and may result in termination of the contract.

- As per Section 63.802 of Delaware's Assisted Living Regulations, on at least a semi-annual basis, the assisted living agency shall survey each consumer or his/her representative regarding their satisfaction with services provided.
  1. The assisted living agency shall retain all surveys which shall be reviewed during inspections.
  2. The assisted living agency shall maintain documentation which addressed what actions were taken as a result of the surveys.
- Not interfere with the right of consumers and/or families to form consumer and family groups, such as resident councils, and must make available, upon request, private meeting space for such groups;
- Provide adequate notification (at least 30 days in advance) to DSAAPD of plans to discharge any consumer in the ALMWP and provide evidence that residents' rights regulations are followed and that; the consumer and family and/or surrogate received timely notice; a discharge plan has been

developed in conjunction with the consumer; and prior to issuance of a discharge notice, efforts were made to address identified problems.

- Provide notice to the DSAAPD and DSS when changes, such as the following occur:
  1. A change in ownership, including a change in the membership of boards of directors or other corporate governing bodies;
  2. A change in the assisted living agency's director;
  3. Any change in the form of legal organization of the assisted living agency.

At least 60 days advance notice for planned changes, and immediate notification when unforeseen changes occur, is required. Contracts with assisted living agencies may not be transferred; when a change in ownership or corporate structure occurs, DSS will determine if a new contract must be negotiated with the ALMWP provider.

#### Management

The provider must:

- Adopt the ALMWP's Guiding Principles, and specify in policies and procedures how the principles will be implemented. The Guiding Principles adopted for Delaware's ALMWP specify that each ALMWP provider will:
  1. Be rooted in the consumer driven values of home and community based services that seek to maximize individual decision making and independence.
  2. Personalize the services provided according to each individual's preferences and capabilities.
  3. Enable consumers to remain in their assisted living residence by providing flexible support to accommodate varying needs and expectations that will evolve over time.
  4. Maximize the ability of consumers to choose both the types of supports the program will provide them and the level of responsibility they will assume in addressing their service needs.
  5. Provide consumers with assisted living services in a wide range of settings that offer security, privacy and an affordable home-like environment.
  6. Provide supportive and health services based on a social model of care rather than on an institutional model of medical care.
- Ensure that the director of the assisted living agency meets the following minimum standards:
  - Education – A high school diploma or equivalent is required, plus at least 20 hours of education or

training in one or more of the following areas: assisted living administration; health care or nursing home administration; nursing; gerontology; social work; or other relevant human service or administrative discipline. Documentation must be provided to verify training and/or course work.

Experience – At least two years experience as a director of a residential facility, nursing facility or home health agency; or at least three years experience as a nurse, social worker, or senior manager in a residential setting, nursing facility, home health agency, or an agency providing ADL assistance to the aging and/or adults with disabilities.

Background check – The ALMWP provider must present evidence that prior to employment a background check was completed on the director. This will be evidenced by contacting the State Adult Abuse, Nurse Aide and Child Abuse Registries and obtaining or attempting to obtain service letters from current or most recent employer and from all health care and child care employers for the past five years. ALMWP providers may not employ as a director a person who has a finding or conviction of abuse, neglect, exploitation or misappropriation of funds.

Orientation and training for providers – All directors must complete an initial orientation and training program for ALMWP providers given by DSAAPD.

Ongoing education and training – All directors must complete at least 10 hours of training each calendar year in one or more of the following areas: any aspect of assisted living or long term care facility administration; gerontology; Alzheimer’s Disease or other dementia care; disabilities; mental health.

- The ALMWP provider must ensure that all staff of the assisted living agency meet the following minimum standards:

Education – A high school diploma or equivalent plus certification as a nurse aide or home health aide, or successful completion of other appropriate caregiver training. Documentation must be provided to verify training and/or course work.

Experience – At least one-year experience as a caregiver in a residential setting, nursing facility,

home health agency or agency providing ADL assistance to the aging and/or adults with disabilities is preferred but not required as long as educational qualifications are met.

Background check – The provider must present evidence that prior to employment, a background check was completed on all staff by contacting the State Adult Abuse, Nurse Aide and Child Abuse Registries and obtaining or attempting to obtain reference letters from previous employer(s) of the last three years. ALMWP providers may not employ, as a caregiver, a person who has a finding or conviction of abuse, neglect, exploitation or misappropriation of funds.

Orientation and training for all staff – All staff must receive an initial orientation and training program for assisted living staff, which may be provided by the ALMWP provider.

Ongoing education and training – All staff who have direct consumer contact must complete at least 10 hours of training each calendar year in one or more of the following areas: care-giving skills focused on the aging and/or adults with physical disabilities; assisted living philosophy or care-giving skills; gerontology; Alzheimer’s Disease or other dementia care; mental health.

Specialized training – Staff must receive specialized training to meet the needs of particular consumers, when such training is identified as necessary by DSAAPD.

- Ensure that staff who provide nursing services are appropriately licensed.
- Ensure that caregivers who provide assistance with self-administration of medications have successfully completed a State Board of Nursing approved medication training course and must demonstrate competence annually.
- Employ sufficient numbers of staff to meet a range of consumer’s service needs.
- Ensure that drivers in their employ who provide transportation to consumers have an appropriate valid driver’s license.
- Have the capacity for automated billing.
- Enter into an ALMWP contract and be willing to enter into a State Funded Assisted Living contract.

ServicesThe provider must:

- Be responsible and accountable for providing the services delineated in the Service Agreement.
- Have the capacity to meet the current and changing service needs of consumers they admit under the ALMWP, complying with the assisted living services definitions.
- Ensure that assisted living services are of a high quality and that the manner in which services are delivered enhances, to the greatest extent possible, the consumer's ability to function independently and to exercise choice and control over his/her life.
- Provide flexible services that accommodate and support the consumer's independence and ability to make decisions.
- Support Managed Risk Agreements and recognize the consumer's right to take responsibility for the risks associated with exercising choice and decision-making.
- Participate jointly with the consumer, the consumer's representative and the DSAAPD representative, if requested by the consumer, in the development of the Service Agreement. The initial Service Agreement must be developed in a face-to-face meeting and must be scheduled at a time and place that is mutually agreeable to all parties. The provider must accommodate the consumer's individual needs. The initial agreement must be completed no more than 30 days before move-in.
- Ensure that the Service Agreement and any Managed Risk Agreement, negotiated between the ALMWP provider and the consumer, is completed and received by DSAAPD at least 10 days prior to the consumer's admission into the assisted living agency.
- Ensure that the health care needs of the consumer are addressed when he/she is on a non-medical/social leave of absence. This may necessitate a referral to a DSAAPD case manager.

**VI. OBTAINING PRIOR AUTHORIZATION**

Prior authorization is required for all nursing aide, skilled nursing and private duty nursing services that are beyond the scope covered by the ALMWP (see General Information section of this manual). These services can only be provided by an agency or entity that is enrolled with the DMAP as a home health agency (with a provider number ending in "14") or a private duty nurse (with a provider number ending in "38"). ALMWP providers may not bill the DMAP for the above services using their ALMWP provider number ending in "74".

The primary care physician, family, consumer, home

health agency, or private duty nurse should direct requests for prior authorization to the appropriate DSAAPD location as listed on the front of this manual.

The request should include the following information:

- Name of consumer
- Consumer's Medical Assistance ID number
- Date of birth
- Detailed medical history that documents the need for the home health or private duty nursing service requested
- Nursing assessment and plan of care. Plan of care includes rehabilitation goals and objective designed to restore, improve, or maintain the consumer's optimal level of functioning, self-care, self-responsibility, independence, and quality of life. Assessment includes, but is not limited, to the following components:
  1. Physical assessment and diagnosis
  2. Psycho-social assessment including home, family and environmental factors
  3. Level of function (physical, mental, developmental)
  4. Availability and ability of caretaker to maintain client in the home, e.g., knowledge of emergency procedures

The DSAAPD will forward a letter detailing the prior authorization to the home health agency or private duty nurse. This notification must be retained in the home health agency or private duty nurse medical record.

**VII. SUPPLEMENTAL SERVICES PAYMENT**

The following is quoted from the Assisted Living Provider Specifications (1998):

Supplemental Services Payment: consumers with dementia or other cognitive impairments who have the characteristics such as those listed below may need additional staff support, intervention and supervision from the assisted living agency. ALMWP providers that serve persons with dementia or other cognitive impairments must have the capacity to provide needed staff support, intervention and supervision to such individuals.

ALMWP providers may request approval from DSAAPD to receive a supplemental payment for individual consumers, equivalent to 10% of the base payment.

A request for supplemental payment will be approved based on evidence that all of the conditions specified below are met.

1. Documentation is presented of the consumer's diagnosis of severe cognitive impairment with one or more of the characteristics specified below, as determined by a written assessment of the consumer's psychosocial and cognitive status in consultation with an appropriate medical and/or mental health professional. Characteristics include,

but are not limited to, the following:

- Severe memory loss
- Disorientation/confusion
- Impaired judgement which significantly affects ability to recognize the need for assistance
- Inability to recognize danger
- Inability to communicate needs by any means or to summon assistance

2. Documented evidence is provided to verify that a pattern of significant behavior problems exists, that is, significant behavior problems occur frequently and/or are unpredictable. Such behaviors must be shown to have a specific impact on the health, safety and/or independent functioning of the consumer and/or the health safety, independent functioning and/or rights of other consumers, with the result that supervision is needed all or most of the time. Behaviors that may rise to the level of significant behavior problems include, but are not limited to, the following:

- Wandering
- Self abusive behaviors
- Verbal aggression, e.g., cursing, threatening to strike, hit, punch, bite
- Agitation/disruptive behavior, e.g., screaming, banging, throwing objects
- Combative behavior/physical aggression during care or in interactions with others
- Verbal or physical sexual advances, public masturbation

3. A cognitive intervention plan is developed by the provider in consultation with an appropriate medical and/or mental health professional. The consumer and the consumer's family and/or surrogate decision-maker also must be involved in the development of the plan and must give written consent before it is finalized. The cognitive intervention plan must:

- Be flexible
- Emphasize practical remedies
- Ensure consumer safety while maximizing the consumer's ability to make decisions and function independently
- Include a program of meaningful structured activities, when appropriate
- Include a plan for making environmental changes identified, as necessary
- Provide consultation with and availability of support from appropriate dementia, disability and/or mental health specialists

## **VIII. REIMBURSEMENT**

Providers enrolled in the ALMWP are reimbursed a per diem rate based on the consumer's level of service needs.

ALMWP providers are reimbursed from a nursing home Turn Around Document (TAD) based on the monthly

service rate assigned to the consumer by DSAAPD. The consumer may be assigned one of three possible monthly service levels and may qualify for a supplemental amount as determined by DSAAPD. Refer to the Billing Instructions of this manual for information regarding the completion of the TAD.

Medicaid does not reimburse the assisted living provider for room and board. The consumer is responsible for these charges. Room and board is a flat monthly rate as determined by DSAAPD.

The consumer's patient pay amount is deducted from the monthly payment to the assisted living provider.

Medicaid does not reimburse the assisted living provider for "bed-hold" days (e.g., a bed held for a consumer who is physically absent from the facility because of hospitalization or non-medical/social leave absence).

REVISION:

### **General Policy**

#### **Medicaid Home & Community Based Waiver Services**

##### Elderly and Disabled Waiver

The Elderly and disabled waiver program is a community based residential services program administered by the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) for eligible recipients age 18 years and older.

The purpose of the Medicaid Waiver for the Elderly and Disabled is to avoid premature institutionalization of individuals. This is accomplished by the development of a community service package that enables a person to remain comfortably and safely in his/her own home.

For additional information regarding the Elderly and Disabled Waiver program call the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) at 453-3820 in New Castle County and or 422-136 in Kent and Sussex Counties. (see front of General Policy for appropriate address and telephone number).

##### Assisted Living Medicaid Waiver

The Assisted Living Medicaid Waiver program is a community based residential services program administered by the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). The program is targeted to older persons and adults with physical disabilities who are age 18 years and over and who meet Medicaid nursing home admission criteria.

Assisted living is:

- The provision of housing and meals within a "homelike" environments;
- Services to meet an individuals needs, as identified

by a provider service assessment tool and identified in the negotiated Service Agreement, and:

- A philosophy of care which emphasizes consumer independence, choice, privacy and dignity.

For additional information regarding the Assisted Living Medicaid Waiver program call the DSAAPD (see front of General Policy for appropriate address and telephone number).

## Services Requiring Prior Authorization

### Private Duty Nursing

The DMAP will cover private duty nursing only for recipients who are exempt from MCO coverage and who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility. All requests for private duty nursing must be prior authorized. The prescribing practitioner may request prior authorization by sending a letter with the following information to Medicaid's physician Consultant:

- Name of patient.
- Patient's Delaware medical Assistance ID number.
- Date of birth.
- Detailed medical history that documents the need for a private duty nurse.
- Estimated amount and duration of required services (the number of hours per week and the number of weeks/months that the patient is expected to need these services).
- If home health services or prescribed pediatric extended care services are ordered concurrently with private duty nursing, medical justification for the combination of services is required.
- Name and address of the private duty nurse (or private duty nurse organization) who will provide the care.

Private duty nursing services for recipients who are eligible for the Elderly and Disabled HCBS waiver or the Assisted Living Medicaid waiver program must be prior authorized. Prior authorization requests must be referred to nursing staff of the Division for Services for Aging and Adults with physical Disabilities (DSAAPD). See the front of the General Policy for the appropriate address or telephone number.

All other requests should be directed to the Medical Review Team located in the Robscott Building (see front of General Policy for address and telephone number). 453-E Chestnut Hill Road, Newark, DE 19713

HCBS Waiver for the Elderly and Disabled Manual

## VII. SPECIAL BILLING INSTRUCTIONS FOR E/D WAIVER PROVIDERS OBTAINING PRIOR AUTHORIZATION

All E/D. Waiver specific services (see Section V of this manual) must be *prior authorized* by the DSAAPD Case Manager in order for payment to be made. The waiver provider will receive the *prior authorization number* via the HCBS-5 Form generated by the DSAAPD Case Manager (see Appendix A). To bill the DMAP for the above referenced services, providers must utilize their unique E/D Waiver provider identification number ending in the number fifty-five (55), the HCPCS procedure codes listed in Appendix B, and record the prior authorization number on all claims submitted to the DMAP for payment.

Waiver providers who also participate in the DMAP as a home health agency or a private duty nursing organization should refer to the criteria outlined in the Prior Authorization section of the Private Duty Nursing Provider Specific Policy Manual.

### Private Duty Nursing Manual

## V. PRIOR AUTHORIZATION

Private duty nursing services for recipients who are exempt from MCO coverage must be prior authorized before payment from the DMAP is made available. The prescribing practitioner may request prior authorization by sending a letter with the following information to Medicaid's Medical Review Team:

- Name of patient.
- Patient's Delaware Medical Assistance ID number.
- Date of Birth.
- Detailed medical history that documents the need for a private duty nurse.
- Estimated amount and duration of required services (the number of hours per week and the number of weeks/months that the patient is expected to need these services).
- If home health services or prescribed pediatric extended care services are ordered concurrently with private duty nursing, medical justification for the combination of services is required.
- Name and address of the private duty nurse or private duty nurse organization who will provide the care.

Private duty nursing services for recipients who are eligible for the Elderly and Disabled HCBS Waiver program or the Assisted Living Medicaid Waiver program must be prior authorized. Prior authorization requests must be referred to the nursing staff of the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD). See front of General Policy for appropriate address and telephone number.

All other requests for prior authorization should be directed to the Medical Review Team located in the Robscott Building (see front of General Policy for address and telephone number), 153 E. Chestnut Hill Rd., Newark, DE 19713

## VI. HCPCS PROCEDURE CODES

The billing week for private duty nursing service begins on Saturday at 12:01 a.m. and ends Friday at midnight.

The following procedure codes are used to bill Private Duty Nursing services and must be prior authorized by the Medical Review Team. The Medical Review Team will notify the private duty nursing service provider of the appropriate code(s) to be used for their billing purposes

Codes valid for dates of service prior to and including January 17, 1997

~~WW701 Private Duty Nursing, per hour, up to eight hours per day~~

~~WW702 EPSDT Extended Private Duty Nursing, through age 20, per hour, each additional hour above eight, per day~~

Codes valid for dates of service on and after January 18, 1997 for agencies

~~WW701 Private Duty Nurse, employed by agency, per hour, up to eight hours per day~~

~~WW702 EPSDT Extended Private Duty Nurse, employed by agency, for clients through age 20, per hour, each additional hour above eight, per day~~

Codes valid for dates of service on and after January 18, 1997 for self-employed nurses

Codes WW703-WW712 will be used to differentiate multiple self-employed nurses working the same case during the same week

~~WW703 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW704 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW705 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW706 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW707 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW708 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW709 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW710 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW711 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

~~WW712 Private Duty Nurse, self-employed, per hour, up to eight hours per day~~

Codes WW713-WW722 will be used to differentiate

multiple self-employed nurses working the same case during the same week

~~WW713 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW714 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW715 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW716 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW717 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW718 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW719 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW720 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW721 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

~~WW722 EPSDT Extended Private Duty Nurse, self-employed, for clients through age 20, per hour, each additional hour above eight per day~~

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## DEPARTMENT OF INSURANCE

Statutory Authority: 18 Delaware Code,  
Section 1113 (18 Del.C. 1113)

### NOTICE OF PUBLIC HEARING

INSURANCE COMMISSIONER DONNA LEE H. WILLIAMS hereby gives notice that a PUBLIC HEARING will be held on Monday, May 24<sup>th</sup> at 9:30 a.m. in the 2<sup>nd</sup> Floor Conference Room of the Delaware Insurance Department at 841 Silver Lake Boulevard, Dover, DE 19904.

The purpose of the Hearing is to solicit comments from the insurance industry and the general public on the proposed revisions to existing Insurance Department Regulation 53, New Annuity Mortality Table for Use in Determining Reserve Liabilities for Annuities.

The hearing will be conducted in accordance with the Delaware Administrative Procedures Act, 29 Del.C. Chapter 101. Comments are being solicited from any interested party. Comments may be in writing or may be presented orally at the hearing. Written comments must be received by the Department of Insurance no later than Monday, May 17, 1999 and should be addressed to Fred A. Townsend, III, Deputy Insurance Commissioner, 841 Silver Lake Boulevard, Dover, DE 19904. Those wishing to testify or those intending to provide oral testimony must notify Fred A. Townsend, III at 302.739.4251, ext. 157 or 800.282.8611 no later than Monday, May 17, 1999.

### Regulation No. 53

#### New Annuity Mortality Table for Use in Determining Reserve Liabilities For Annuities

#### Table of Contents

##### Section

1. Authority
2. Purpose
3. Definitions
4. Individual Annuity or Pure Endowment Contract
5. Group Annuity or Pure Endowment Contracts
6. Separability
7. Effective Date

#### SECTION 1. AUTHORITY

This rule is promulgated by the Commissioner of Insurance pursuant to 18 Delaware Code Section 1113 and 29 Delaware Code Chapter 101 (Administrative Procedures Act).

#### SECTION 2. PURPOSE

The purpose of this regulation is to recognize ~~new~~ the following mortality tables; for use in determining the minimum standard of valuation for annuity and pure endowment contracts: the 1983 Table "a," and the 1983 Group Annuity (1983 GAM) Table, the Annuity 2000 Mortality Table, and the 1994 Group Annuity Reserving (1994-GAR) Table ~~for use in determining the minimum standard of valuation for annuity and pure endowment contracts.~~

#### SECTION 3. DEFINITIONS

A. As used in this regulation, "1983 Table 'a'" means that mortality table developed by the Society of Actuaries Committee to Recommend a New Mortality Basis for

Individual Annuity Valuation and adopted as a recognized mortality table for annuities in June 1982 by the National Association of Insurance Commissioners.

B. As used in this regulation "1983 GAM Table" means that mortality table developed by the Society of Actuaries Committee on Annuities and adopted as recognized mortality table for annuities in December 1983 by the National Association of Insurance Commissioners.

C. As used in this regulation, "1994 GAR Table" means that mortality table developed by the Society of Actuaries Group Annuity Valuation Table Task Force and shown at XLVII Transactions of the Society of Actuaries 866-867 (1995) and adopted as a recognized mortality table for annuities in December 1996 by the National Association of Insurance Commissioners.

D. As used in this regulation, "Annuity 2000 Mortality Table" means that mortality table developed by the Society of Actuaries Committee on the Life Insurance Research and shown at XLVII Transactions of the Society of Actuaries 240 (1995) and adopted as a recognized mortality table for annuities in December 1996 by the National Association of Insurance Commissioners.

#### SECTION 4. INDIVIDUAL ANNUITY OR PURE ENDOWMENT CONTRACTS

A. Except as provided in Subsections B and C of this section, the 1983 Table "a" is recognized and approved as an individual annuity mortality table for valuation and, at the option of the company, may be used for purposes of determining the minimum standard for valuation for any individual annuity or pure endowment contract issued on or after July 8, 1980.

B. The 1983 Table "a" is to be used for determining the minimum standard valuation for any individual annuity or pure endowment contract issued on or after January 1, 1987.

C. Except as provided in subsection D. of this section, the Annuity 2000 Mortality Table shall be used for determining the minimum standard of valuation for any individual annuity or pure endowment contract issued on or after January 1, 1999.

D. The 1983 Table "a" without projection is to be used for determining the minimum standards for valuation for any individual or pure endowment contract issued on or after January 1, 1999, solely when the contract is based on life contingencies and is issued to fund periodic benefits arising from:

(1) Settlements of various forms of claims pertaining to court settlements or out of court settlements from tort actions

(2) Settlements involving similar actions such as worker's compensation claims; or

(3) Settlements of long term disability claims where a temporary or life annuity has been used in lieu of continuing disability payments.

#### SECTION 5. GROUP ANNUITY OR PURE ENDOWMENT CONTRACTS

A. Except as provided in Subsections B and C of this section, The 1983 GAM Table, and the 1983 Table "a" and the 1994 GAR Table are recognized and approved as group annuity mortality tables for valuation and, at the option of the company, either any one of such tables may be used for purposes of valuation for any annuity or pure endowment purchased on or after July 8, 1980 under a group annuity or pure endowment contract.

B. Except as provided in Subsection C of this section, either (The 1983 GAM Table or the 1994 GAR Table shall is to be used for determining the minimum standard of valuation for any annuity or pure endowment purchased on or after January 1, 1987 under a group annuity or pure endowment contract.

C. The 1994 GAR Table shall be used for determining the minimum standard of valuation for any annuity or pure endowment purchased on or after January 1, 1999 under a group annuity or pure endowment contract.

#### SECTION 6. APPLICATION OF THE 1994 GAR TABLE

In using the 1994 GAR Table, the mortality rate for a person age x in year (1994 + n) is calculated as follows:

$$q_{x-1994+n} = q_{x-1994} (1-AA_x)^n$$

where the  $q_{x-1994}$  and  $AA_x$ s are as specified in the 1994 GAR Table.

#### SECTION 6 7. SEPARABILITY

If any provision of this Regulation or the application thereof to any person or circumstances is for any reason held to be invalid, the remainder of the regulation and the application of such provision to other persons or circumstances shall not be affected thereby.

#### SECTION 7 8. EFFECTIVE DATE

The effective date of this Regulation is December 31, 1985. Subsequent revisions hereto are effective 45 days following the Commissioner's signature.

David N. Levinson Donna Lee H. Williams

Insurance Commissioner

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## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF WATER RESOURCES

Statutory Authority: 7 Delaware Code,  
Chapter 60 (7 Del.C. Chp. 60)

#### REGISTER NOTICE

1. TITLE OF THE REGULATIONS:

**The Land Treatment of Sludge and Sludge Products**

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

Part III, B., of the *Guidance and Regulations Governing the Land Treatment of Wastes in Delaware*, is undergoing revision. The revision will reflect changes necessary to make the State regulation consistent with the Federal regulation, Title 40 of the Code of Federal Regulations, Part 503, *Standards for the Use and Disposal of Sewage Sludge*, that have been in effect since February, 1993.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Delaware Code, Chapter 60 and Section 405(d) and (e) of the Federal Clean Water Act, as amended by Publication L. 95-217, Section 54(d), 91 Statute 1591 (U.S.C. 1345 9 d) and (e): and Publication L. 100-4, Title IV, Section 406 (a), (b), 101 Statute, 71, 72 (33 U.S.C. 1251 et seq.) Code of Federal Regulations, Part 503- Standards for the Use and Disposal of Sewage Sludge.

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None

6. NOTICE OF PUBLIC COMMENT:

A public Hearing on the proposed regulations will be held on June 14th at 7:00 PM in the Auditorium of the Richardson and Robbins Building, 89 Kings Highway, Dover.

## 7. PREPARED BY:

Stephen P. Rohm, Environmental Scientist April 12, 1999

SECTION 100. SCOPE.

~~This document provides regulations for all persons engaged in the collection, handling, storage, treatment, land application, disposal, or transportation of sludge, treated sewage sludge, or any product containing these materials which is either generated or utilized in the State.~~

~~These regulations supersede the Delaware Solid Waste Disposal Regulations of the Department of Natural Resources and Environmental Control, dated August 1974 regarding sludge or any material containing sludge.~~

SECTION 100. AUTHORITY AND SCOPESubsection 101. Authority

~~(1) 7 Delaware Code, Chapter 60; and Sections 405(d) and (e) of the Clean Water Act, as amended by Pub. L. 95-217, Sec. 54 (d), 91 Stat. 1591 (33 U.S.C. 1345 9 d) and (e); and Pub. L. 100-4, Title IV, Sec. 406 (a), (b), 101 Stat., 71, 72 (33 U.S.C. 1251 et seq.) code of Federal Regulations, Part 503 - Standards for the Use of Disposal of Sewage Sludge.~~

Subsection 102. Scope

~~(1) This regulation establishes standards which consist of general requirements, pollution limits, management practices and operational standards for the final use or disposal of sludge generated in the treatment of wastewater at a wastewater treatment or wastewater pretreatment facility. Standards are included in this part for sewage sludge applied to land, sold or given away in bag or bulk or used for research purposes.~~

~~(2) The regulation also provides standards for all persons engaged in the collection, handling, generation, preparation, storage, and transportation of sludge, treated sludge or any product containing these materials in the State of Delaware.~~

~~(3) These regulations supersede the Delaware Solid Waste Disposal Regulations of the Department of Natural Resources and Environmental Control, dated December 1994 regarding sludge or any material containing sludge.~~

~~(4) This regulation in its entirety is effective immediately upon promulgation.~~

SECTION 200. DEFINITIONS. The following terms have the meanings indicated.

(1) "Aerobic digestion" is the biochemical decomposition of organic matter in sewage sludge into primarily carbon dioxide and water by microorganisms in the presence of air.

(2) "Anaerobic digestion" is the biochemical decomposition of organic matter in sewage sludge into methane gas and carbon dioxide by microorganisms in the absence of air.

~~(1) "Agricultural land" means land cultivated for the production of crops or used for raising livestock.~~

(3) "Agricultural land" is land on which a food crop, a feed crop, or a fiber crop is grown. This includes range land and land used as pasture.

~~(4) "Agricultural utilization" means the application rate of wastes or sludge or sludge products which shall not exceed the nutrient needs of the crop grown on the particular soil plus the other assimilative pathways in soils (e.g. immobilization with organic material, volatilization, and leachate in compliance with drinking water standards). The Department may require a lower application rate if the design criteria for pathogens, metals or organics contained in these Regulations plus generally accepted technical standards for land treatment technology (e.g. U.S. EPA Process Design Manuals or Overcash, M.R. and P. Pat. 1979 Design of Land Treatment Systems for Industrial Wastes--Theory and Practice) cannot be achieved at the above application rate. This term may be used interchangeably with "agronomic rate".~~

(5) "Agricultural wastes" means wastes normally associated with the production and processing of food and fiber on farms, feedlots, ranches, ranges, and forests which may include animal manure, crop residues, and dead animals; also agricultural chemicals, fertilizers and pesticides which may find their way into surface and subsurface water.

(6) Agronomic rate" is the whole sludge application rate (dry weight basis) designed:

(1) To provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, cover crop, or vegetation grown on the land; and

(2) To minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the ground water.

(7) "Annual pollutant loading rate" is the maximum amount of a pollutant that can be applied to a unit area of land during a 365 day period.

(8) "Annual whole sludge application rate" is the maximum amount of sewage sludge (dry weight basis) that can be applied to a unit area of land during a 365 day period.

(9) "Applier" is a person who is responsible for applying stabilized sewage sludge to a parcel of land.

(10) "Aquifer" is a geologic formation, grouping of geologic formations, or a portion of a geologic formation capable of yielding ground water to wells or springs.

(11) "Base flood" is a flood that has a one percent chance of occurring in any given year.

(12) "Bulk sewage sludge" is Exceptional Quality sludge that is not sold or given away in a bag or other container for application to the land.

(13) "Collection" means any action involved in the gathering or subsequent placement of sludge, treated sludge, or any other product containing these materials, into a vehicle, container or any other vessel for transportation to some other location.

(14) "Cover" is soil or other material used to cover sewage sludge placed on an active sewage sludge unit.

(15) "Cover crop" is a small grain crop, such as oats, wheat, or barley, grown to prevent nitrogen leaching during the winter months.

(16) "Crops for direct human consumption" means crops that are consumed by humans without processing. ~~to minimize pathogens before distribution to the consumer.~~

(17) "Cumulative pollutant loading rate" is the maximum amount of an inorganic pollutant that can be applied to an area of land.

(18) "Density of microorganisms" is the number of microorganisms per unit mass of total solids (dry weight) in the sewage sludge.

(19) "Department" means the Department of Natural Resources and Environmental Control.

(20) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of sludge, any material containing sludge, or any constituent of it on or in the land, the air or any waters, including ground water, and includes any method of sludge utilization that involves reuse of nutrients in the sludge at greater than agronomic rates (this excludes land reclamation).

(21) "Distribute" means to barter, sell, offer for sale, consign, furnish, provide, or otherwise supply a material as part of a commercial enterprise or a giveaway program.

(22) "Domestic septage" is either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, holding tank, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap at a restaurant.

(23) "Domestic sewage" is water and wastewater from humans or household operations that is discharged to or otherwise enters a treatment works.

(24) "Dry weight basis" means calculated on the basis of having been dried at 105 degrees Celsius until reaching a

constant mass (i.e., essentially 100 percent solids content).

(25) "Exceptional Quality Sludge ("EQ Sludge") sludge that has been stabilized (as per Subsection 603 by a Further Reduction Pathogens, meets one of the Vector Attraction Reduction Requirements specified in Subsection 604(a-h) and contains lower metal concentrations than the allowable Pollutant Concentration specified Table 402-3.

(26) "Feed crops" are crops produced primarily for consumption by animals.

(27) "Fiber crops" are crops such as flax, cotton, and hemp.

(28) "Food chain crops" means tobacco, crops grown for human consumption, and crops grown to feed animals whose products are consumed by humans.

(29) "Food crops" are crops consumed by humans. These include, but are not limited to, fruits, vegetables, and tobacco.

(30) "Forest" is a tract of land thick with trees and underbrush.

(31) "Forestry" means the science of the ecosystems, management and production of a forest or forest system.

(32) "Free liquids" means liquids which readily separate from the solid portion of a waste under the following tests:

~~(a) EPA Plate Test. Place a 1 to 5 kilogram (2.2 to 11.0 lbs.) sample of waste on a level or slightly sloping plate of glass or other similarly flat and smooth solid material for at least 5 minutes. If a liquid phase separation is observed, the waste contains free liquids.~~

~~(b) EPA Gravity Test. The test protocol calls for a 100 ml representative sample of the waste from a container to be placed in a 400 micron conical paint filter for 5 minutes. The filter specified is a standard paint filter which is commonly available at hardware and paint stores. The filter is to be supported by a funnel on a ring stand with a beaker or cylinder below the funnel to capture any free liquid that passes through the filter. If any amount of free liquid passes through the filter, the waste is considered to hold free liquids.~~

(33) "Grease trap waste" means the combined liquid and solid fractions of material accumulated in a tank or other device designed for the removal of grease, fat and oil from wastewater (for the purpose of these regulations petroleum products are excluded).

(34) "Grit (and screenings)" are the heavy materials such as sand, gravel, cinders and egg shells collected in the preliminary treatment of sewage. Screenings are the materials separated from wastewater during preliminary treatment made up of floatable debris such as wood, plastic and cloth.

(35) "Ground water" is water below the land surface in the saturated zone.

(36) "Handling" means any way in which sludge, treated sludge, or any other product containing these materials is dealt with, other than collection, burning, storage, treatment, land application, disposal, or transportation. It includes distribution of treated sludge.

(37) "Holding tank waste" means wastewater from any home or business that is held temporarily in a container where no on-site treatment is performed. The wastewater is hauled off site for treatment.

(38) ~~"Household waste" means any waste derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, and day-use recreation areas) which is not sewage or septage.~~

(39) "Impermeable" means having a hydraulic conductivity equal to or less than  $1 \times 10^{-7}$  cm/sec as determined by field and laboratory permeability tests made according to standard test methods which may be correlated with soil densification as determined by compaction tests.

(40) "Industrial wastewater" is wastewater generated in a commercial or industrial process.

(41) "Label" means the display of all written, printed, or graphic material on the immediate container, or information accompanying the material.

(42) "Land application" means the placement of sludge, treated sludge, or any other product containing these materials on or within 2 feet below the surface of land used to support vegetative growth.

(43) ~~"Land disposal of sludge" means application of sludge at rates higher than acceptable for agricultural utilization. This shall not be permitted unless the applicant can demonstrate that the land to be used has been dedicated solely to that purpose or to a compatible purpose for a period sufficient to protect human health and the environment. This dedication is established by a duly recorded land instrument in a form acceptable to the Department. In addition, the proposed application rates must meet the design criteria of these Regulations.~~

(44) "Land with a high potential for public exposure" is land that the public uses frequently. This includes, but is not limited to, a public contact site and a reclamation site located in a populated area (e.g., a construction site located in a city).

(45) "Land with a low potential for public exposure" is land that the public uses infrequently. This includes, but is not limited to, agricultural land, forest, and a reclamation site located in an unpopulated area (e.g., a strip mine located in a rural area).

(46) "Land reclamation" means the application of sludge at a rate not greater than necessary to support and maintain immediate revegetation. Application may be in multiple cycles prior to establishment of vegetation, but must be accomplished within a single short-term operational period.

(47) "Land treatment" means a technology for the intimate mixing or dispersion of wastes into the upper zone of the plant-soil system with the objective of microbial stabilization, immobilization, selective dispersion, or crop recovery leading to an environmentally acceptable assimilation of the waste.

(48) "Landfill" means a natural topographic depression, man-made excavation or diked area formed primarily of earthen materials, which has been lined with man-made materials or remains unlined and which is designed to hold an accumulation of solid wastes. ~~Design requirements for storage are given in Section 900 of the Sludge and Sludge Products Regulations.~~

(49) "Liquid waste" means any waste which is not a solid waste as defined for the purposes of these regulations.

(50) "Other container" is either an open or closed receptacle. This includes, but is not limited to, a bucket, box, carton, truck or trailer.

(51) "Pasture" is land on which animals feed directly on forage crops such as legumes, grasses, grain stubble, or stover.

(52) "Pathogenic organisms" are disease-causing organisms. These include, but are not limited to, certain bacteria, protozoa, viruses, and viable helminth ova.

(53) "Permitting authority" is either EPA or a State with an EPA-approved sludge management program.

(54) "Person" means an individual, trust, firm, joint stock company, federal agency, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body.

(55) "PFRP" means process to further reduce pathogens.

(56) "pH" means the logarithm of the reciprocal of the hydrogen ion concentration.

(57) "Pollutant" is an organic substance, an inorganic substance, a combination of organic and inorganic substances, or a pathogenic organisms that, after discharge and upon exposure, ingestion, inhalation, or assimilation into an organism, either directly from the environment or indirectly by ingestion through the food chain, could, on the basis of information available to the Administration of EPA, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including

malfunctions in reproduction), or physical deformations in either organisms or offspring of the organisms.

(58) "Pollutant limit" is a numerical value that describes the amount of a pollutant allowed per unit amount of sewage sludge (e.g., milligrams per kilogram of total solids); the amount of a pollutant that can be applied to a unit area of land (e.g., kilograms per hectare); or the volume of a material that can be applied to a unit area of land (e.g., gallons per acre).

(59) "Preparer" is a person who prepares sewage sludge or is either the person who generates sewage sludge during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge.

(60) "PSRP" means process to significantly reduce pathogens.

(61) "Public contact site" is land with a high potential for contact by the public. This includes, but is not limited to, public parks, ball fields, cemeteries, plant nurseries, turf farms, and golf courses.

(62) "Range land" is open land with indigenous vegetation.

(63) "Reclamation site" is drastically disturbed land that is reclaimed using sewage sludge. This includes, but is not limited to, strip mines and construction sites.

(64) "Runoff" is rainwater, leachate, or other liquid that drains overland on any part of a land surface and runs off of the land surface.

~~(65) "Septage" means the liquid and solid contents of a septic tank or cesspool (does not include holding tank wastes).~~

(65) "Sewage" means water-carried human or animal wastes from septic tanks, water closets, residences, buildings, industrial establishments, or other places, together with such groundwater infiltration, subsurface water, admixture of industrial wastes or other wastes as may be present.

(66) "Sewage sludge" means sludges which derives in whole or in part from sewage.

(67) "Silviculture" means any forest management activity, including but not to, the harvest of timber, construction of roads and trails for the purpose of forest management, and preparation of property for reforestation.

(68) "Sludge compost" means a treated sludge produced by subjecting a mixture of sludge and a bulking agent, such as wood chips, to aerobic decomposition in a manner that destroys primary pathogenic and malodorous components.

(69) "Sludge" means the accumulated semi-liquid suspension, settled solids, or dried residue of these solids that is deposited from (a) liquid waste in a municipal or

industrial wastewater treatment plant, (b) domestic septage is included herein as sludge (see section 200, (22)).

(70) "Sludge generator":

(a) Means a person who owns or operates a facility that receives or processes wastewater and produces or otherwise generates sludge.

(b) Does not include the owner or operator of a septic tank, chemical toilet, privy, or holding tank used for the collection of sewage.

(71) ~~"Sludge utilization" means the collection, handling, burning, preparation, transportation, storage, treatment, land application, disposal, or transportation marketing and distribution of sludge.~~

(72) "Sludge utilizer" means: any person who collects, ~~handles, burns,~~ stores, applies to land, ~~treats, disposes of, or transports or markets or distributes~~ sludge.

(73) "Solid waste" means any garbage, refuse, rubbish, and other discarded materials resulting from industrial, commercial, mining, agricultural operations and from community activities which does not contain free liquids. Containers holding free liquids shall be considered solid waste when the container is designed to hold free liquids for use other than storage (e.g. radiators, batteries, transformers) or the waste is household waste.

(74) "Specific oxygen uptake rate (SOUR)" is the mass of oxygen consumed per unit time per unit mass of total solids (dry weight basis) in the sewage sludge.

(75) "Spray irrigation" means the loading rate for land treatment of wastewater which shall not exceed either the needs of the crop grown on the particular soil plus the other assimilative mechanisms (immobilization with organic material, volatilization, and leachate in compliance with drinking water standards), or the hydraulic capacity of the soil. The Department may require a lower loading rate if the design criteria for pathogens, metals or organics contained in these Regulations and generally accepted technical standards for land treatment technology (e.g. U.S. EPA Process Design Manual or Overcash, M.R. and P. Pal 1979 Design of Land Treatment Systems for Industrial Wastes -Theory and Practice cannot be achieved at a rate consistent with agricultural utilization.

(76) "Storage" means the interim containment (*for a period not to exceed two years*) of sludge, treated sludge, or any other product containing these materials after removal from ~~the~~ a wastewater treatment plant and before disposal or utilization.

(77) "Surface impoundment" means a natural topographic depression, ~~and/~~ or diked area formed primarily of earthen materials (~~although it may be lined with man-made materials~~) or remains unlined, and which is designed

to hold an accumulation of liquid wastes or wastes containing free liquids. ~~Examples of surface impoundments are holding, storage, settling, and elevation pits, ponds, and lagoons. Design requirements for storage are given in Section 900 of the Sludge and Sludge Products Regulations.~~

(78) "Total solids" are the materials in sewage sludge that remain as residue when the sewage sludge is dried at 103 to 105 degrees Celsius.

(79) "Transportation" means the off-site movement of sludge, treated sludge, or any other product containing these materials by air, rail, highway, pipeline, or water.

(80) Treat or treatment of sewage sludge" is the preparation of sewage sludge for final use or disposal. This includes, but is not limited to, thickening, stabilization, and dewatering of sewage sludge.

(81) "Treatment" means a process which alters, modifies, or changes the biological, physical, or chemical characteristics of sludge or liquid waste.

(82) "Treatment works" means any device and system used in the storage, treatment, recycling and reclamation of municipal sewage, or industrial wastes of a liquid nature, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power and other equipment, and their appurtenances, extensions, improvements, remodeling, additions and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities and improvements to exclude or minimize inflow and infiltration.

(83) "TWDS" means Treatment Works Treating Domestic Sewage.

(84) "Unstabilized solids" are organic materials in sewage sludge that have not been treated in either an aerobic or anaerobic treatment process.

(85) "Vector attraction" is the characteristic of sewage sludge that attracts rodents, flies, mosquitos, or other organisms capable of transporting infectious agents.

(86) "Volatile solids" is the amount of the total solids in sewage sludge lost when the sewage sludge is combusted at 550 degrees Celsius in the presence of excess air.

(87) "Wastewater treatment plant" means a facility designed and constructed to receive, treat, or store waterborne wastes.

(88) "Wetlands" means those areas that are inundated or saturated by surface water or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and

similar areas.

#### SECTION 300. PERMITS.

##### Subsection 301. Permits Required.

(1) Unless excepted under the provisions of Subsection 301(2), a person may not engage in the generation, collection, handling, storage, treatment, preparation, land application, marketing and distribution, disposal or transportation of sludge, treated sludge, or any product containing these materials in the State without first obtaining a permit from the Department. No permit may be granted unless the county or municipality having jurisdiction has first approved the activity by zoning procedures provided by law. No person shall use sludge, treated sludge or any product containing these materials for the purpose of agricultural use, land reclamation, research, distribution or land disposal if the sludge was generated outside of the State of Delaware without obtaining a permit from the Department. No permit shall be issued for agricultural use, land reclamation, research, distribution or land disposal of sludge, treated sludge or any product containing sludge generated outside the State of Delaware that does not meet the standards for Exceptional Quality as outlined in these regulations. No sludge or sludge product generated in the State shall be transported, marketed, distributed, prepared or land applied in any other state or jurisdiction without notification of the permitting authority of that state or jurisdiction. No permit (excepting transporter permits) shall be granted pursuant to these regulations for any sludge determined to be "hazardous" as defined by applicable state or federal regulation. Activities involving the collection, storage, treatment, land application, or transportation of septage shall be performed in accordance with the State of Delaware's Septage Management Plan.

~~The applicant shall be responsible for paying all advertising costs associated with noticing any permit application that is required by these regulations.~~

(2) Exceptions. Permits issued under this regulation are not required for the following persons or entities: (1) a wastewater treatment plant, if the pertinent activities involve the construction and operation of the plant in accordance with plans approved by the Department. This exception does not include removal of sludge from the plant.

##### (2) Persons using treated sludge which:

(a) Satisfies the requirements for sludge distribution in these regulations, and

(b) Is distributed in accordance with a valid permit issued by the Department.

Subsection 302. Exclusions.

(1) A permit from the Department is not required under these regulations for the following activities. The exclusion under these regulations do not exclude requirements from other Federal, State, County or local regulations as they may apply:

(a) Cofiring of sewage sludge with other waste in an incinerator, unless the other waste is used as auxiliary fuel for the firing of the sludge.

(b) Hazardous wastewater sludge determined to be hazardous by this regulation or any other Federal, State, County or local regulation as they may apply.

(c) Sewage sludge with high PCB concentrations as determined by this regulation or any other Federal, State, County or local regulations as they may apply.

(d) Incinerator ash for use or disposal from the firing of sewage sludge in a sewage sludge incinerator.

(e) Grit and screenings generated or collected in a wastewater treatment process.

(f) Aquatic plants or managed wetlands plants used and harvested as part of a wastewater treatment process and that are not complexed with the sludge at the time of harvest.

(g) Drinking water treatment residuals from non-sewage sources.

(h) Commercial septage, industrial septage, a mixture of domestic septage and commercial septage or a mixture of domestic septage and industrial septage.

(i) Grease trap waste.

Subsection 303. Application for a Permit

(1) Initial applications for permits, permit renewals or permit modifications under the provisions of these regulations shall be submitted to the department on an application form specified by the Department.

(2) An application consists of the initial application form specified by the Department combined with a Project Development Report (PDR) containing any supplementary information and analysis necessary to enable the Department to review the proposed project to determine if it is consistent with Delaware law and regulation.

(3) An application shall demonstrate how the applicant plans to comply with the applicable requirements of these regulations, as well as any additional operating requirements set forth in these regulations that are specifically applicable to the particular type of operation that is proposed.

(4) A separate permit application shall be submitted for each sludge utilization site. Adjacent properties owned by separate individuals shall be considered as separate sites. Non contiguous but proximate parcels owned by one person

may. At the discretion of the Department, be considered as a single utilization site.

(5) Depending on the sludge utilization method chosen, additional specific submission requirements may apply. These requirements are given in Section 700 of the regulation.

Subsection 304. Public Notice, Application for Sludge Utilization Permit.

Upon Department acceptance of the Project Development Report, the applicant must apply for a Department Sludge Utilization permit. Upon receipt of a completed application for this permit, the Department will advertise receipt of the application and conduct any hearings in accordance with 7 Del. C., Ch. 60. The cost of the advertisement is to be borne by the applicant.

The final permit will require submission by the applicant and approval by the Department of any revisions required by the Department for the Plan of Operation and Management or Plans and Specifications report for the facility prior to start-up and operation.

Subsection ~~303~~ 305. Standard Permit Conditions. The following conditions shall apply to and be included in all permits.

(1) Compliance Required. The permittee shall comply with all conditions of the permit.

(2) Renewal Responsibilities. If the permittee intends to continue operation of the permitted facility after the expiration of an existing permit, the permittee shall apply for a new permit in accordance with these regulations.

(3) Operation of Facilities. The permittee shall at all times properly maintain and operate all structures, systems, and equipment for treatment, control and monitoring, which are installed or used by the permittee to achieve compliance with the permit or these regulations.

(4) Provide Information. The permittee shall furnish to the Department within a reasonable time, any information including copies of records, which may be requested by the Director to determine whether cause exists for modifying, revoking, reissuing, or terminating the permit, or to determine compliance with the permit or these regulations.

(5) Entry and Access. The permittee shall allow the Department, consistent with 7 Del. C., Chapter 60, to:

(a) Enter the permitted facility.

(b) Inspect any records that must be kept under these regulations or conditions of the permit.

(c) Inspect any facility, equipment, practice, or operation permitted or required by the permit.

(d) Sample or monitor for the purpose of assuring

permit compliance, any substance or any parameter at the facility.

(6) Reporting. The permittee shall report to the Department under the circumstances and in the manner specified in this section:

(a) In writing thirty (30) days before any planned physical alteration or addition to the permitted facility or activity if that alteration or addition would result in any significant change in information that was submitted during the permit application process.

(b) In writing thirty (30) days before any anticipated change which would result in noncompliance with any permit condition or these regulations.

(c) Orally within twenty-four (24) hours from the time the permittee became aware of any noncompliance which may endanger the public health or the environment at telephone numbers provided in the permit by the Department.

(d) In writing as soon as possible but within five (5) days of the date the permittee knows or should know of any noncompliance unless extended by the Department. This report shall contain:

(i) A description of the noncompliance and its cause;

(ii) The period of noncompliance including to the extent possible, times and dates and, if the noncompliance has not been corrected, the anticipated time it is expected to continue; and

(iii) Steps taken or planned to reduce or eliminate reoccurrence of the noncompliance.

(e) In writing as soon as possible after the permittee becomes aware of relevant facts not submitted or incorrect information submitted, in a permit application or any report to the Director. Those facts or the correct information shall be included as a part of this report.

(7) Minimize Impacts. The permittee shall take all necessary actions to eliminate and correct any adverse impact on the public health or the environment resulting from permit noncompliance.

(8) Reopener. In the event that the regulations governing the land treatment of sludges and sludge products are revised by the Department, this permit may be reopened and modified accordingly after notice and opportunity for a public hearing.

Subsection ~~304~~ 306. Specific Permit Conditions.

(1) Basis for Specific Permit Conditions. Conditions necessary for the protection of the environment and the public health may differ from facility to facility because of varying environmental conditions and waste compositions.

The Department may establish additional permit conditions. Specific conditions shall be established in consideration of characteristics specific to a facility and inherent hazards of those characteristics. Such characteristics include, but are not limited to:

(a) Chemical, biological, physical, and volumetric characteristics of the sludge;

(b) Geological and climatic nature of the facility site;

(c) Size of the site and its proximity to population centers and to ground and surface water;

(d) Legal considerations relative to land use and water rights;

(e) Techniques used in sludge distribution and the disposition of that vegetation exposed to sludge;

(f) Abilities of the soils and vegetative covers to treat the sludge without undue hazard to the environment or to the public health; and

(g) The need for monitoring and record keeping to determine if the facility is being operated in conformance with its design and if its design is adequate to protect the environment and the public health.

(2) Duration of Permit. The permit shall be effective for a fixed term of not more than five (5) years.

(3) Limitations to Operation. Conditions of the permit may specify or limit:

(a) Sludge composition;

(b) Method, manner, and frequency of sludge treatment;

(c) Sludge pretreatment requirements;

(d) Physical, chemical, and biological characteristics of a land application facility; and

(e) Any other condition the Department finds necessary to protect public health or environment.

(4) Compliance Schedules. The Department may establish a compliance schedule for existing facilities as part of the permit conditions including:

(a) Specific steps or actions to be taken by the permittee to achieve compliance with applicable requirements or final permit conditions;

(b) Dates by which those steps or actions are to be taken; and

(c) In any case where the period of time for compliance exceeds one (1) year the schedule may also establish interim requirements and the dates for their achievement.

(5) Monitoring Requirements. Any facility may be subject to monitoring requirements including, but not limited to:

(a) The installation, use, and maintenance of

monitoring equipment;

(b) Monitoring or sampling methodology, frequency, and locations;

(c) Monitored substances or parameters;

(d) Testing and analytical procedures; and

(e) Reporting requirements including both frequency and form.

Subsection ~~305~~ 307. Permit Modification.

(1) Minor Modifications. Minor modifications are those which if granted would not result in any increased hazard to the environment or to the public health. Such modifications shall be made by the Director. Minor modifications are normally limited to:

(a) The correction of typographical errors.

(b) Transfer of ownership or operational control.

(c) A change in monitoring or reporting frequency.

(2) Major Modifications. All modifications not considered minor shall be considered major modifications. The procedure for making major modifications shall be the same as that used for a new permit under these regulations.

Subsection ~~306~~ 308. Permit Transferable.

Permits shall be transferable to a new owner or operator provided that the permittee notifies the Department by requesting a minor modification of the permit before the date of transfer and provided that the transferee shows evidence of a legal right to use the site and is otherwise in compliance with all applicable provisions of these regulations.

Subsection ~~307~~ 309. Appeal of Final Permits.

Appeals of final permit shall be governed by 7 Del. C., §6008 and 6009.

Subsection ~~308~~ 310. Permit Revocation.

(1) Conditions for Revocation. The Department may revoke a permit if the permittee violates any permit condition or these regulations or fails to pay applicable Department fees.

(2) Notice of Revocation. Except in cases of emergency, the Department shall issue a written notice of intent to revoke to the permittee prior to final revocation. Revocation shall become final within twenty (20) days of receipt of the notice by the permittee, unless within that time the permittee requests an administrative hearing in writing.

(3) Notice of Hearing. The Department shall notify the permittee in writing of any revocation hearing at least twenty (20) days prior to the date set for such hearing. The hearing shall be conducted in accordance with 7 Del. C., Chapter 60.

(4) Emergency Action. If the Department finds the

public health, safety or welfare requires emergency action, the Department shall incorporate findings in support of such action in a written notice of emergency revocation issued to the permittee. Emergency revocation shall be effective upon receipt by the permittee. Thereafter, if requested by the permittee in writing, the Department shall provide the permittee a revocation hearing and prior notice thereof. Such hearings shall be conducted in accordance with 7 Del. C., Chapter 60.

SECTION 400. PROCEDURES FOR STATE REVIEW AND APPROVAL.

Subsection 401. Proposal for ~~Land Treatment~~ a Sludge Utilization Permit.

Any person who intends to ~~develop a land treatment system for~~ utilize sludge or sludge products must submit a letter of intent to the Department. The letter shall indicate the projected location, size, and anticipated utilization method ~~for the system~~. The steps in Table 402-1 provide the prospective permit applicant with an overview of the entire Department process. Whenever the preparation of reports or other documents required by these regulations involves the practice of engineering, geology or other recognized profession under Delaware law, sufficient evidence of appropriate certification or registration in accordance with Title 24 of the Delaware Code must be submitted by the preparer. The guidance document included with these regulations should be used to tailor the design criteria for the specific waste, process, use, or ~~and~~ site under consideration.

Subsection 402. Project Development Report: *General Requirements.*

(1) A Project Development Report must be prepared. ~~After a site has been selected by the designer as generally suitable for sludge land application, a Project Development Report must be prepared.~~ After this report is submitted for Department review, and ~~once~~ accepted, it becomes the basis for the permit application. ~~for the project.~~ In any event, the applicant must demonstrate that the proposed ~~Land Treatment System~~ facility, site or use will meet the regulatory objectives set forth in ~~§300 of the Policies and Procedures for Land Treatment of Wastes, in these regulations~~ and will not cause violations of State or Federal drinking water standards on an average annual basis or State water quality standards for streams.

Upon receipt of a Project Development Report, the Department will schedule a public information meeting to inform ~~nearby residents~~ interested citizens of the proposed ~~land application projects~~ utilization project. The Department may consider local zoning or other locally required meetings

as sufficient for satisfying this requirement. After the Department has fixed the date, place and time for a public information meeting, the Department shall notify by certified mail owners and occupants of land contiguous to the site of the proposed project facility or site and of the scheduled meeting. A copy of the Project Development Report will be available for review and discussion at the public meeting. The applicant for the permit shall also be present at the public meeting to present information on the proposed project.

The Department will accept and consider all comments, concerns and suggestions received during the public meeting. If the concerns raised at the public meeting cannot be reasonably addressed, a permit will not be issued for the proposed project.

An outline of materials which must be addressed by the design is given in Table 402-1. Further details regarding the required items in Table 402-1 are as follows:

(1) Maps and related information.

(a) Each Project Development Report shall contain a topographic map or maps on a scale not less than a USGS 7.5 minute series or equivalent, including any necessary narrative descriptions, which show the following:

(i) All boundaries and names of present owners of record of land and including easements, rights of way, and other property interests, for the proposed permit area and contiguous area; and a description of all title, deed, or usage restrictions affecting the proposed permit area.

(ii) The boundaries of the land where sludge will be applied over the estimated total life of the proposed operation, including the boundaries of land that will be affected in each sequence of land application activity.

(iii) The boundaries of any land where sludge will be stored at various times over the estimated total life of the proposed operation.

(iv) The location and name of any domestic wells within 1000 feet and irrigation, commercial, industrial and public wells within 2500 feet of the outer edge of the buffer zone as defined in 701(4). Information may be obtained (for a fee) through the Department from the Delaware Water User Data System (DWUDS).

(v) The location and type of existing or proposed erosion control practices following SCS guidelines.

(vi) For land disposal sites, the location of the surveyed permanent physical markers which identify the dedicated area.

(vii) Other information that the Department deems relevant or necessary.

(b) Each Project Development Report shall contain

a soil map which shows the locations and types of soils found within the proposed permit area and which includes a report on the field investigations conducted by a person who is registered as a Professional Soil Scientist with the American Registry of Certified Professionals in Agronomy, Crops and Soils (ARCPACS) depicting soils conditions on the site. This element should be prepared and submitted to the Department early in the process so that unsuitable sites/areas can be eliminated from further analysis.

(2) Chemical analysis of sludge.

(a) Each Project Development Report shall include results of three chemical analyses of the sludge from each treatment facility or other source of sludge that is proposed for land application. The Department will waive this requirement for domestic septage that is land applied in accordance with the State's Septage Management Plan. Chemical analyses include:

(2) Project Development Reports for all proposed facilities, land application sites and sludge uses must provide a chemical analysis of the sludge to be produced or utilized which includes the following:

(a) Results of three chemical analyses of the sludge from each treatment facility or other source of sludge. The Department will waive this requirement for domestic septage that is land applied in accordance with the State's Septage Management Plan. Chemical analyses include:

(i) Moisture content.

(ii) Percent total nitrogen (moist and dried).

(iii) Percent organic nitrogen (moist and dried).

(iv) Ammonium and nitrate concentration (moist and dried).

(v) pH.

(vi) Percent volatile solids.

(vii) PCB's.

(viii) The following, as reported on a dry weight basis: cyanide, sodium, calcium, magnesium, phosphorous, potassium, cadmium, zinc, copper, nickel, lead, chromium, and mercury, arsenic, molybdenum and selenium.

(ix) Such other components or constituents which may be required by the Department, including but not limited to TOC, COD, FOG, and boron.

(b) Sludges are to be analyzed as a composite sample for the priority pollutants. If the organics are higher than the typical municipal sludge range in the U.S. (see Table 402-21) then the Department shall require the applicant to submit a detailed assimilative study sludge analysis for those elevated organic constituents to assess the treatment in the soil system their fate in a soil matrix.

(c) Sludges are to be analyzed as a composite

sample using the Toxicity Characteristic Leaching Procedure (TCLP). Any sludge that fails the TCLP test shall be deemed to be hazardous and will then be subject to regulations under Subtitle C of the Resource Conservation and Recovery Act (RCRA).

(f d) For septage, a specific plan for obtaining representative samples may be required.

(e) No sludge or sludge product which exceeds the Ceiling Concentrations in Table 402.2 will be permitted for land application in the State. Sludge or sludge products which exceed the Pollutant Concentrations in Table 402.3 will not be permitted for marketing and distribution in the State. Application rates for any sludge may not exceed the values in Tables 402.4 and Table 402.5.

(d f) The analyses shall be conducted on composite samples of the waste to be applied, and shall be reported in a tabular form that lists the range of the three samples. Each of the composite samples shall be taken at intervals of more than 30 days unless otherwise approved by the Department in writing. Sampling and analytical procedures shall be approved by the Department and be consistent with Section 1200 of these Regulations.

(3) Soils description:

(a) Each Project Development Report shall contain a description of the soils within the proposed permit area. This shall include a description of the Depth, matrix, color, texture, structure, pH, consistency, degree of mottling and, if present, mottled colors and coarse fragment content for each horizon of soil from the surface to a depth of at least 5 feet or bedrock, whichever is shallower. The applicant shall base this description on a sufficient number of pits, hand augerings, or excavations to allow an accurate characterization of the soils within the proposed permit area. As a minimum however, the Department requires that at least one sample be taken for every 5 to 10 acres of each soil series to confirm the Soil Conservation Service mapping.

(b) All classifications and interpretations of soil materials required by this section shall be based on criteria specified in the United States Department of Agriculture Handbooks 436 (Soil Taxonomy) and 18 (Soil Survey Manual).

(e) The Project Development Report shall include a minimum of three chemical analyses for each major soil series at the proposed facility. Soil chemistry testing must be in accordance with the Methods of Soil Analysis published by the American Society of Agronomy, or otherwise shall be consistent with Department guidance and the requirements of Section 1200. Results are to be expressed on a dry soil basis. The constituents to be tested are pH, cation exchange capacity, percent organic matter,

plant nutrient status, total cadmium, total copper, total lead, total nickel, total zinc.

(d) ~~When sludge was previously applied within 5 years to the proposed permit area, the application shall also describe background concentrations for all constituents identified above for similar soils where sludge has not been applied.~~

(e) ~~The information required by this section shall be prepared by qualified persons in soil science or land treatment.~~

(4) ~~Groundwater information. The Project Development Report shall contain a description of the groundwater hydrology of the proposed site and adjacent area. The following information shall be prepared by a Geologist or a Professional Engineer qualified in hydrology and licensed to practice in the State of Delaware:~~

(a) ~~A map of the site and surrounding area showing all potential contamination sources (such as large on-site systems, feedlots, bulk storage facilities, etc.). Surface water bodies within 1,000 feet of the site boundary of the proposed sludge application area shall also be located.~~

(b) ~~Description of the geology of the area, including the lithology and thickness of the outcropping and subcropping or underlying formations. Any unique or important geomorphological features which could influence groundwater flow directions should also be indicated.~~

(e) ~~The following hydrogeological information should be provided to the Department:~~

(i) ~~The thickness, saturated thickness, and depth to water (DTW) of the water table aquifer. The depth to water measurement should indicate the level of the local seasonal high water table.~~

(ii) ~~The DTW of the seasonal high water table formed by a perched water table when these water table types exist.~~

(iii) ~~The thickness, lithology, and name of the geological formation which forms the first aquitard or aquiclude beneath the water table aquifer.~~

(iv) ~~The name of the first confined aquifer beneath the ground surface including the name(s) of the formation(s) composing this aquifer.~~

(d) ~~A description of the groundwater flow patterns under the proposed site. A hydraulic head contour map with groundwater flow lines should be included in the description. When the direction of the groundwater flow cannot be determined with any degree of confidence, observation wells (piezometers) in numbers sufficient enough to determine groundwater flow direction will be required. Areas which exhibit little topographic relief and which are isolated from the effects of a perennial drainage~~

~~well generally need observation well installations for groundwater flow determinations.~~

~~(e) Reference must be provided for all the geological and hydrogeological information which was researched.~~

~~(5) Surface water information.~~

~~(a) Each Project Development Report shall contain a description of the surface waters in the proposed site and adjacent area, including the name of the watershed which will receive any water discharges, the location of all surface water bodies such as streams, lakes, ponds, and descriptions of major surface drainage systems within the proposed permit area and adjacent area.~~

~~(b) Each Project Development report shall also include a plan to manage runoff and control erosion during the lifetime of the facility. These plans will use best management practices for nonpoint source pollution control such as developed by the USDA Soil Conservation Service.~~

~~(6) Plan of Operation and Management—a plan shall be submitted which is consistent with the requirements of Subsection 406.~~

#### Subsection 402. Site Inspection and Concurrence

~~The Project Development Report which includes the plan of operation and management and the engineering specification report is submitted for Department review along with a request for general site concurrence. Upon receipt of the report, a Department representative will inspect the selected site(s) and a written site concurrence or denial letter will be sent to the applicant. Upon receipt of a site concurrence the applicant may submit a permit application. Site concurrences for land treatment of sludges are valid for one year.~~

#### Subsection 403. Project Development Reports: Specific Requirements for Facilities.

A permit is required for the construction and operation of any sludge handling, storage, processing or treatment operation. Such facilities include, but are not limited to: composting, alkaline stabilization or heat drying facilities, storage lagoons or tanks, and disposal sites. Information required for the Project Development Report includes:

(1) Maps and related information.

(a) A topographic map or maps on a scale not less than a USGS 7.5 minute series or equivalent, including any necessary narrative descriptions, which show the following:

(i) All boundaries and names of present owners of record of land and including easements, rights of way, and other property interests, for the proposed permit area and contiguous area; and a description of all title, deed,

or usage restrictions affecting the proposed permit area.

(ii) Latitude and longitude of site

(iii) The boundaries of any land where sludge or sludge product will be stored at various times over the estimated total life of the proposed operation.

(iv) The location and name of any domestic wells within 1000 feet and irrigation, commercial, industrial and public wells within 2500 feet of the outer edge of the buffer zone as defined in 701(4). Information may be obtained (for a fee) through the Department from the Delaware Water User Data System (DWUDS).

(v) Other information that the Department deems relevant or necessary.

(b) A soil map which shows the locations and types, and engineering properties of soils found within the proposed permit area and which includes a report on the field investigations conducted by a registered Engineer or Professional Soil Scientist depicting soils conditions on the site. This element should be prepared and submitted to the Department early in the process so that unsuitable sites/areas can be eliminated from further analysis.

(2) Ground water information. The Project Development Report shall contain a description of the ground water hydrology of the proposed site and adjacent area.

The following information shall be prepared by a Geologist, Hydrologist or a Professional Engineer qualified in hydrology and licensed to practice in the State of Delaware.

(a) A map of the site and surrounding area showing all potential contamination sources (such as large on-site systems, feedlots, bulk storage facilities, etc.), Surface water bodies within 1,000 feet of the site boundary of the proposed sludge application area shall also be located.

(b) Description of the geology of the area, including the lithology and thickness of the outcropping and subcropping or underlying formations. Any unique or important geomorphological features which could influence ground water flow directions should also be indicated.

(c) The following hydrogeological information should be provided to the Department:

(i) The thickness, saturated thickness, and depth to water (DTW) of the water table aquifer. The depth to water measurement should indicate the level of the local seasonal high water table.

(ii) The DTW of the seasonal high water table formed by a perched water table when these water table types exist.

(iii) The thickness, lithology, and name of the geological formation which forms the first aquitard of

aquiclude beneath the water table aquifer.

(iv) The name of the first confined aquifer beneath the ground surface including the name(s) of the formation(s) composing this aquifer.

(d) A description of the ground water flow patterns under the proposed site. A hydraulic head contour map with ground water flow lines should be included in the description. When the direction of the ground water flow cannot be determined with any degree of confidence, observation wells (piezometers) in numbers sufficient enough to determine ground water flow direction will be required.

(e) Reference must be provided for all the geological and hydrogeological information which was researched.

(3) Surface water information.

(a) Each Project Development Report shall contain a description of the surface waters in the proposed site and adjacent area, including the name of the watershed which will receive any water discharges, the location of all surface water bodies such as streams, lakes, ponds, and descriptions of major surface drainage systems within the proposed permit area and adjacent areas.

(b) Each Project Development report shall also include a plan to manage runoff and control erosion during the lifetime of the facility. These plans will use best management practices for nonpoint source pollution control such as developed by the USDA Natural Resources Conservation Service (NRCS).

(4) Detailed Construction Specifications - Each Project Development Report shall include drawings of proposed site layout, plan and elevation view of structures, equipment layout, facility access, and construction site erosion and sediment controls, stamped by an engineer registered in the state of Delaware.

(5) Plan of Operation and Management - Each plan shall contain a narrative description of the following:

(a) Explaining the type of operation to be conducted at the proposed facility.

(b) Detailing the operation and processing steps of the proposed facility; the expected life of the operation; and the origin, dry weight and volume of sludge that are proposed to be utilized during the operation.

(c) The equipment to be used at the facility for handling, storage, processing and treatment (including mixing, air control, bagging and monitoring the sludge or sludge products), or site preparation and land disposal of sludge.

(d) The closure plan and future use of the site if the facility ceases operation.

(e) A control plan to prevent health hazards or nuisances.

(f) For disposal sites, a crop nitrogen balance, the proposed application rate per acre and management scheme, crops to be grown; phosphorus and other constituent loading rates; determination of land limiting constituent; acreage needed and required storage volume, if any; and the dates (or climatic conditions) when the applicant proposes to apply sludge.

(g) Material Safety Data Sheets

(6) Endangered Species Assessment - No facility may be constructed or operated in a manner likely to adversely affect a threatened or endangered species listed under section 4 of the Endangered Species Act or its designated critical habitat. An endangered or threatened species and impact report is required.

(7) Additional requirements for land disposal sites

(a) Each Project Development Report shall contain a description of:

(i) Soils within the proposed permit area, including a description of the depth, matrix, color, texture, structure, pH, consistency, degree of mottling and, if present mottled colors and coarse fragment content for each horizon of soil from the surface to a depth of at least five (5) feet or bedrock, whichever is shallower.

(ii) Any subsurface conditions adversely affecting lateral or vertical drainage of the land.

(iii) A delineation of soil areas at the site which are not suitable for land application of sludge.

The applicant shall base the description on a sufficient number of pits, hand augerings, or excavations to allow an accurate characterization of the soils within the proposed permit area. As a minimum, however, the Department requires that at least one sample be taken for every 5 to 10 acres of each soil series to confirm NRCS.

(b) All classifications and interpretations of soil materials required by this section shall be based on criteria specified in the United States Department of Agriculture Handbooks 436 (Soil Taxonomy) and 18 (Soil Survey Manual).

(c) The Project Development Report shall include a minimum of three chemical analyses for each major soil series at the proposed facility. Soil chemistry testing must be in accordance with the Methods of Soil Analysis published by the American Society of Agronomy, or otherwise shall be consistent with Department guidance and the requirements of Section 1200. Results are to be expressed on a dry soil basis. The constituents to be tested are pH, cation exchange capacity, percent organic matter, plant nutrient status, total cadmium, total copper, total lead,

total nickel, total zinc, total arsenic, total selenium and total molybdenum.

(d) For sites where sludge was previously applied within 5 years to the proposed permit area, the application shall also describe background concentrations for all constituents identified above for similar soils where sludge has not been applied.

(e) The information required by this section shall be prepared by qualified persons in soil science or land treatment.

(8) Additional requirements for sludge storage facilities are identified in section 900.

#### Subsection 404. Application for Permit

(1) Initial applications for permits, permit renewals, or permit modifications under the provisions of these regulations shall be submitted to the Department on an application form specified by the Department.

(2) An application consists of the initial application form specified by the Department combined with any supplementary information and analyses necessary to enable the Department to review the proposed project to determine if it is consistent with Delaware laws and regulations.

(3) An application for the land application of sludge shall:

(a) Comply with the requirements of these regulations.

(b) Comply with the additional application requirements that are specifically applicable to the particular type of operation that is proposed.

(c) Contain such additional information as may be required by the Department.

(4) An application shall demonstrate how the applicant plans to comply with the applicable requirements of these regulations as well as any additional operating requirements set forth in these regulations that are specifically applicable to the particular type of operation that is proposed.

(5) A separate permit application shall be submitted for each sludge utilization site. Adjacent properties owned by separate individuals shall be considered as separate sites. Nonecontiguous but proximate parcels owned by a person may, at the discretion of the Department, be considered as a single utilization site.

(6) Depending upon the sludge utilization method chosen, additional specific submission requirements may apply. These requirements are given in Section 700.

#### Subsection 404. Project Development Reports: Specific Requirements for Land Application Sites.

Sludge or sludge products which meet the minimum

quality criteria of Subsection 402 and Section 600, but do not meet Exceptional Quality criteria for marketing and distribution, may only be applied to sites permitted for land application. Land application to permitted sites may be for agricultural, silvicultural, reclamation or research purposes. The following information is required in the Project Development Report for each land application site:

(1) Maps and related information.

(a) Each Project Development Report shall contain a topographic map or maps on a scale not less than a USGS 7.5 minute series or equivalent, including any necessary narrative descriptions, which show the following:

(i) Latitude and longitude of the site.

(ii) All boundaries and names of present owners of record of land and including easements, rights of way, and other property interests, for the proposed permit area and contiguous area; and a description of all title, deed, or usage restrictions affecting the proposed permit area.

(iii) The boundaries of the land where sludge will be utilized over the estimated total life of the proposed operation, including the boundaries of the land that will be affected in each sequence of sludge utilization activity.

(iv) The boundaries of any land where sludge or sludge product will be stored at various times over the estimated total life of the proposed operation.

(v) The location and name of any domestic wells within 1000 feet and irrigation, commercial, industrial and public wells within 2500 feet of the outer edge of the buffer zone as defined in 701(4). Information may be obtained (for a fee) through the Department from the Delaware Water User Data System (DWUDS).

(vi) The location and type of existing or proposed erosion control practices following NRCS guidelines.

(vii) Other information that the Department deems relevant or necessary.

(b) Each Project Development Report shall contain a NRCS soil map which shows the locations and types of soils, depth to ground water, and depth to impermeable strata within the proposed permit area. The Department may require additional detailed mapping and soils investigations conducted by a Professional Soil Scientist registered with the American Registry of Certified Professionals in Agronomy, Crops and Soils (ARCPACS). This element should be prepared and submitted to the Department early in the process so that unsuitable sites/areas can be eliminated from further analysis.

(2) Soils description.

(a) Each Project Development Report shall contain a description of:

(i) Soils within the proposed permit area, including a description of the depth, matrix, color, texture, structure, pH, consistency, degree of mottling and, if present mottled colors and coarse fragment content for each horizon of soil from the surface to a depth of at least five (5) feet or bedrock, whichever is shallower.

(ii) Any subsurface conditions adversely affecting lateral or vertical drainage of the land.

(iii) A delineation of soil areas at the site which are not suitable for land application of sludge.

The applicant shall base the description on a sufficient number of pits, hand augerings, or excavations to allow an accurate characterization of the soils within the proposed permit area. As a minimum, however, the Department requires that at least one sample be taken for every 5 to 10 acres of each soil series to confirm NRCS.

(b) All classifications and interpretations of soil materials required by this section shall be based on criteria specified in the United States Department of Agriculture Handbooks 436 (Soil Taxonomy) and 18 (Soil Survey Manual).

(c) The Project Development Report shall include a chemical analyses for each major soil series per field at the proposed site. Soil chemistry testing must be in accordance with the Methods of Soil Analysis published by the American Society of Agronomy, or otherwise shall be consistent with Department guidance. Results are to be expressed on a dry soil basis. The constituents to be tested are pH, cation exchange capacity, percent organic matter, plant nutrient status, total cadmium, total copper, total lead, total nickel, total zinc.

(d) For sites where sludge was previously applied within 5 years to the proposed permit area, the application shall also describe background concentrations for all constituents identified above for similar soils where sludge has not been applied.

(e) The information required by this section shall be prepared by qualified persons in soil science or land treatment.

(3) Ground water information. The Project Development Report shall contain a description of the ground water hydrology of the proposed site and adjacent area. The following information shall be prepared by a Geologist or a Professional Engineer qualified in hydrology and licensed to practice in the State of Delaware.

(a) A map of the site and surrounding area showing all potential contamination sources (such as large on-site systems, feedlots, bulk storage facilities, etc.). Surface water bodies within 1,000 feet of the site boundary of the proposed sludge application area shall also be located.

(b) Description of the geology of the area, including the lithology and thickness of the outcropping and subcropping or underlying formations. Any unique or important geomorphological features which could influence ground water flow directions should also be indicated.

(c) The following hydrogeological information should be provided to the Department:

(i) The thickness, saturated thickness, and depth to water (DTW) of the water table aquifer. The depth to water measurement should indicate the level of the local seasonal high water table.

(ii) The DTW of the seasonal high water table formed by a perched water table when these water table types exist.

(iii) The thickness, lithology, and name of the geological formation which forms the first aquitard of aquiclude beneath the water table aquifer.

(iv) The name of the first confined aquifer beneath the ground surface including the name(s) of the formation(s) composing this aquifer.

(d) A description of the ground water flow patterns under the proposed site. A hydraulic head contour map with ground water flow lines should be included in the description. When the direction of the ground water flow cannot be determined with any degree of confidence, observation wells (piezometers) in numbers sufficient enough to determine ground water flow direction *may* be required.

(e) Reference must be provided for all the geological and hydrogeological information which was researched.

(4) Surface water information.

(a) Each Project Development Report shall contain a description of the surface waters in the proposed site and adjacent area, including the name of the watershed which will receive any water discharges, the location of all surface water bodies such as streams, lakes, ponds, and descriptions of major surface drainage systems within the proposed permit area and adjacent areas.

(b) Each Project Development report shall also include a plan to manage runoff and control erosion during the lifetime of the facility. These plans will use best management practices for nonpoint source pollution control such as developed by the NRCS.

(5) Plan of Operation and Management - each Project Development Plan shall contain a narrative description of the following:

(a) The origin, annual production (dry weight and volume) and pathogen reduction method for the proposed sludge source.

(b) The type of operation (e.g. agricultural, silvicultural, reclamation or research) to be conducted at the proposed site, and the expected life of the operation.

(c) The equipment to be used for site preparation, sludge handling, and land application.

(d) A projected three year crop rotation plan, including type of farming operation, type of crop, planting sequence, crop management, and use of the crops.

(e) Crop fertility worksheets for each field including: a nitrogen balance and the proposed sludge or septage application rate per acre (calculated according to the requirements of Subsection 702.1); phosphorus loading rate; lime loading rate; and a determination of the most limiting constituent, for land application for each sludge source.

(f) The expected dates and climatic conditions when sludge will be land applied.

(g) A control plan to prevent health hazards or nuisances and odors.

(h) A sludge sampling plan documenting how the applicant will comply with the monitoring and record keeping and reporting requirements of Section 700.

(i) A map showing the location of any ground water monitoring devices if they exist or are proposed for the facility.

(j) Evidence of landowner and operator consent for the proposed operation.

(6) Endangered Species Assessment - no sludge or products derived from sludge shall be applied to land in a manner likely to adversely affect a threatened or endangered species or its designated habitat. An endangered or threatened species impact report may be required.

(7) Additional requirements for land reclamation sites:

(a) A complete revegetation plan for the site, including methods of site preparation, seeding mixtures, and seeding rates.

(b) Calculations or modeling demonstrating that the Cumulative Pollutant Loading Rates established by these regulations (see Table 402.4) shall not be exceeded.

(8) Additional requirements for Research Projects:

(a) Applications for permits shall include five copies of a complete description of the project. After a preliminary review, the Department may request such additional information as is necessary to evaluate and document the project.

(b) As a condition of any permit under this section the titleholder must execute and record in the appropriate County Office of Recorder of Deeds an affidavit in a form approved by the Department which notifies prospective purchasers that the property has been used to conduct sludge utilization research.

#### Subsection 405. Plans and Specifications

~~(1) Review. After acceptance of the Project Development Report, the applicant must submit final detailed plans and specifications. These should be completed in accordance with the regulations of the Department. The plans and specifications will be reviewed for consistency with the Project Development Report and accepted engineering standards. The engineering specifications for a sludge land treatment system are given in Table 405-1.~~

#### Subsection 405. Project Development Reports: Specific Requirements for Marketing and Distribution of Exceptional Quality Sludge or Sludge Products

Sewage sludge or sludge products that contain sewage sludge which has been stabilized as per Subsection 603 by a Process to Further Reduce Pathogens, meets one of the Vector Attraction Reduction Requirements specified in Subsection 604(2)(a-h) and contains lower metal concentrations than the allowable Pollutant Concentration specified Table 402.3 may be marketed and distributed in the State. Specific information required for the Project Development Report includes:

(1) Identification of the site(s) where the Exceptional Quality sludge or sludge product is generated. A description of the source and quantity of sludge or sludge products generated.

(2) A detailed description of the treatment process and facility equipment, which clearly explains how the end-product is treated to meet the Exceptional Quality criteria.

(3) A description of the quality control and monitoring program(s) utilized at the facility.

(4) A description of the record keeping and reporting system used at the facility producing the exceptional quality material.

(5) A copy of the proposed label which includes the following information:

(a) It shall identify the product as containing sludge and provide the name and address of the preparer.

(b) Provide information on essential plant nutrient content and instructions for proper use on different plant types, soils and slopes, maximum loading rates (such as number of square feet per bag, ratio of sludge to soil in sludge-soil mixture, etc.).

(c) For sludge or sludge products for general distribution to the public which contain more than 4 percent iron on a dry weight basis, it shall warn against using the sludge or sludge product on pasture land.

(d) Describe proper procedures for storage and stockpiling of the material.

(e) A statement indicating that the product should not be applied to any site that is flooded, frozen or snow covered, and identify any unacceptable uses of the material.

(f) Shall include a statement that land application of sewage sludge is prohibited except in accordance with the instructions on the label or information sheet.

(6) Information confirming that all requirements of the Delaware Department of Agriculture Regulations (Chapter 21, Title 3, Delaware Code) governing the sale of commercial fertilizers and soil conditioners have been met.

Subsection 406. Plan of operation and management. Compliance with the following requirements shall be maintained:

(1) General requirements for operating plans. Each plan shall contain a narrative description:

(a) Explaining whether the proposed operation is for agricultural utilization, research, land reclamation, or land disposal of sludge.

(b) Of the general operating plan for the proposed operation, including the proposed life of the operation, and the origin and weight (dry basis) and volume of sludge that are proposed to be applied during the operation.

(c) Of the proposed application rate per acre, which shall be consistent with the applicable Departmental guidelines for the proposed operation and consistent with the Project Development Report, and the dates (or climatic conditions) when the applicant proposes to apply sludge.

(d) Of the equipment to be used for site preparation, land application of sludge, sludge incorporation into the soil when incorporation is required, seeding and maintenance of the site.

(e) Of the current and future use that will be made of the proposed site if the proposed activity is approved.

(f) Of a nuisance control plan to prevent health hazards or nuisances.

(2) Additional requirements. The following items must be addressed in developing the operating plan:

(a) Each person that conducts sludge utilization shall comply with all of the following:

(i) The requirements of the Delaware Environmental Protection Act, 7 Del. C., Ch. 60, these regulations, and the additional operating requirements for the specific type of operation that are set forth in these regulations.

(ii) The plans and specifications in the permit, the terms and conditions of the permit, and any orders issued by the Department.

(iii) The Departmental regulations for agricultural utilization, unless the person is operating

pursuant to a permit that allows use of the loading rate guidelines for land reclamation, utilization or disposal at landfills, research projects, land disposal, or sludge distribution program, in which case the person shall comply with the applicable guidelines for such operation.

(b) Prior to land application, all sewage sludge shall be stabilized according to a method approved by the Department.

(c) Sewage sludge shall not be applied to land where:

(i) Root vegetables or vegetables which are eaten raw are grown or will be grown within two years following sludge application. (See also Section 701(5).)

(ii) Tobacco is grown or will be grown.

(d) Sludge shall be applied to the soil surface or incorporated in a manner that prevents unreasonable nuisance or odor conditions.

(e) No person shall use spray irrigation equipment to apply sludge unless such person has demonstrated to the Department in his permit application the specific means by which pathogens will be controlled so as not to present a public health hazard. At a minimum, the report shall include the design effectiveness of the proposed bactericidal and viricidal equipment, the means by which aerosol-borne bacteria and viruses will be contained and the impact of wind velocity on the latter's transport offsite or that appropriate buffer zones have been included, and the Department has approved such equipment or areas as part of the permit.

(f) Livestock shall not be allowed to graze for at least 1 month after the application of sewage sludge.

(g) Areas where the land application of sludge is prohibited shall be mapped.

(h) Limitations on sludge disposal shall be discussed.

(i) Continuing analysis of sludge:

(i) The sludge generator shall submit to the Department and landowner a chemical analysis of the sludge in accordance with §402(2) of these regulations every three months following the first application of sludge, for 402(2)(a)(i-ix) and annually for 402(2)(b) unless the Department approves a different schedule in the permit. The parameters for analysis are to be developed based upon the critical or controlling constituents from the Project Development Report.

(ii) The sludge generator shall perform and submit to the Department and landowner additional analyses as used in the permit application and design if there has been a significant change (greater than 25%) in the quality of sludge.

(iii) The Department may modify the approved

sludge application rate based upon review of continuing or additional analyses:

(iv) The sludge generator shall submit to the Department a sludge sampling program which satisfies the requirements of Section 1200.

(3) Record keeping and reporting requirements; daily operational records:

(a) Any person that disposes of sludge by land application shall make and maintain an operational record for each day that such sludge is applied and when any other management activities are conducted at the land application site:

(b) The daily operational record, which shall be recorded on a form supplied by the Department, shall include the following:

(i) The date, type, and wet and dry weights of the sludge applied

(ii) The facility from which the sludge originated:

(iii) The transporters of the sludge:

(iv) The particular map location of the area currently being used for land application of sludge, and the areas where sewage sludge was previously applied within 5 years:

(v) A record of any major deviations from the operating plan:

(vi) General daily weather conditions:

(vii) The application rate for sludge:

(viii) A record of all actions taken to correct violations of the Delaware Environmental Protection Act and the Department's regulations:

(ix) Management undertaken, such as planting and harvesting of crops, fertilizers and chemicals added, techniques used, etc.

(c) When sludge is being stored at the site, the operator shall maintain accurate operational records sufficient to determine whether the waste is being stored in accordance with the Department's requirements for such operations:

(4) Record keeping and reporting requirements; annual operation report:

(a) Any person that utilizes sludge by land application shall submit to the Department and landowner an annual operation report on or before February 1 of each year:

(b) The annual operation report, which shall be submitted in a format specified by the Department, shall include the following:

(i) The weight or volume of each type of sludge received:

(ii) The type, weight, and volume of sludge

received from each generator location in which the sludge originated:

(iii) A copy of the operator's current public liability insurance policy:

(iv) Any changes in ownership of the land where the operation is conducted or any change in any lease agreement for the use of such land that may affect or alter the operator's rights upon such land:

(v) The annual groundwater monitoring evaluation if groundwater monitoring is required by the Department:

(vi) A chemical analysis of soil for each field at the facility for those constituents identified in the sludge, unless otherwise specified by the Department in the permit. The procedure for soil analysis shall be consistent with the Department guidance:

(vii) Any other information required by the Department:

(c) The annual operation report shall also contain a topographic map of the same scale and contour interval as the map required for the initial permit application, showing the field boundaries where sludge has been applied:

#### Subsection 406. Site Inspection and Concurrence.

The Project Development Report is submitted for Department review along with a request for general site concurrence. Upon receipt of the report, a Department representative will inspect the selected site(s) and a written site concurrence or denial letter will be sent to the applicant. Upon receipt of a site concurrence the applicant may submit a permit application. Site concurrences for land treatment of sludges are valid for one year.

#### Subsection 407. Public Notice, Application for Land Treatment System (LTS) Permits

Upon Department acceptance of the Project Development Report which includes the Plan of Operation and Management and the engineering specification report, the applicant for the proposed facility must apply for a Department Land Treatment System (LTS) Permit. Upon receipt of a completed application for this permit, the Department will advertise receipt of the application and conduct any hearings in accordance with 7 Del. C., Ch. 60. The cost of the advertisement is to be borne by the applicant.

The final permit will require submission by the applicant and approval by the Department of any revisions required by the Department for the Plan of Operation and Management or Plans and Specifications report for the facility prior to start-up and operation.

Subsection 407. Facility Plans and Specifications.

(1) After Department acceptance of the permit application and completed Project Development Report (prepared under Subsection 403), the applicant must submit final detailed plans and specifications. The plans and specifications will be reviewed for consistency with the Project Development Report and accepted engineering standards.

Subsection 408. Approval to Commence Operations.

~~Upon approval of the revisions to the Plan(s), a letter authorizing operation under the land treatment system permit will be issued on a timely basis. Upon granting written approval for operation, final Departmental review and approval of any required revisions to the Project Development Plan, a permit and a letter of authorization to commence operation will be issued on a timely basis. The Department shall give notice of such approval to any person who has submitted a written request for such notice.~~

SECTION 500. BONDING.

Subsection 501. Bond Required. Unless excepted under the provisions of Subsection 502, as a requirement for keeping a Permit issued under these regulations, a person shall file with the Department a bond or other security in a form approved by the Department. The bond shall be payable to the Department and the obligation of the bond shall be conditioned upon the fulfillment of all requirements related to the permit.

Subsection 502. Exceptions. Bond is not required for the following persons or entities:

- (1) A landfill, which is owned and operated by the Delaware Solid Waste Authority pursuant to state laws and regulations;
- (2) Persons using treated sludge that complies with all the requirements for distribution of these regulations and that is distributed in accordance with a valid permit issued by the Department;
- (3) Any local, municipal, county, state, or federal governmental agency, or political subdivision; or
- (4) Septage land treatment systems utilizing a limited application rate of 7,100 gallons per acre per year or less.

Subsection 503. Amount of Bond. The amount of the bond shall be:

- (1) \$5,000 for transportation permits and research projects;
- (2) \$25,000 for permits to apply sludge to land at agricultural rates;

- (3) \$50,000 for permits to land apply sludge for land reclamation;
- (4) \$125,000 for land disposal facilities;
- (5) \$75,000 for projects other than those in Subsection 503 (1)-(4).
- (6) \$10,000 for distribution and marketing.

Subsection 504. Consolidation of Bonds. For permits to apply sludge to land at agricultural rates or at land reclamation rates the Department may allow a sludge utilizer to file one bond to cover more than one utilization site. The amount of the bond shall be the amount shown in Subsection 503 for the first site plus 40 percent of the amount shown in Subsection 503 for each additional site up to a minimum total of \$200,000.

Subsection 505. Liability. Liability under the bond shall remain in effect until the expiration date of the permit. The Department shall release the bond after the Department determines that all of the conditions of the permit or permits covered by the bond have been fulfilled.

Subsection 506. Execution and Payment of Bond.

(1) The bond shall be executed by the applicant and by a corporate surety licensed to do business in this State. Instead of having a bond executed by a corporate surety, the applicant may elect to deposit, with the Department, cash or negotiable bonds of the federal government or of this State or any other securities acceptable to the Department. The amount of the cash deposit or the market value of any securities shall be at least equal to the required sum of the bond. The Department shall receive and hold the cash or securities in trust, for the purposes for which the deposit is posted.

(2) The obligation of the applicant and of any corporate surety under the bond shall become due and payable, and all or any part of any cash or securities shall be applied to payment of the costs of properly fulfilling any requirement of the Permit if the Department has:

(a) Notified the applicant and any corporate surety that the conditions of the Permit have not been fulfilled, and specified in the notice the particular deficiencies in the fulfillment of the permit conditions;

(b) Given the applicant and any corporate surety a reasonable opportunity to correct the deficiencies and to fulfill all of the conditions of the permit; and

(c) Determined that, at the end of a reasonable length of time, some or all of the deficiencies specified under Subsection 506(2)(a), above, remain uncorrected.

SECTION 600. PATHOGEN CONTROL, PATHOGENS AND VECTOR ATTRACTION REDUCTION REQUIREMENTS.

Subsection 601. Requirements for Pathogen Control. All sewage sludge must be treated by a process to significantly reduce pathogens (PSRP) or process to further reduce pathogens (PFRP). The Department may require that the operator of the sludge treatment process conduct monitoring and record information which demonstrates that the conditions necessary to achieve the specified pathogen reduction are maintained. The Department may waive this requirement if the sludge is to be utilized in a manner that precludes potential health hazards due to the presence of pathogens:

(1) All sewage sludges and domestic septage prepared for land application in Delaware must at a minimum be treated by one of the processes described in this section to significantly reduce pathogens (PSRP). Sludges treated to meet PSRP requirements will be defined as Class B sludges for the purpose of these regulations.

(2) All sewage sludges prepared for Distribution and Marketing in Delaware must be treated by one of the processes to further reduce pathogens as described in the section (PFRP). Sludges treated to meet the PFRP requirements will be defined as Class A sludges for the purpose of these regulations.

(3) Any sewage sludge or domestic septage prepared in a manner to meet the Class A or Class B requirements of this section must also meet the additional requirements found in these regulations prior to being applied to land, given away or sold in bulk or bag.

Subsection 602. Class B Sludge - Sewage sludges processed to Significantly Reduce Pathogens (PSRP). The following are PSRP's: (Septage included herein as sewage sludge)

(1) Aerobic Digestion. The process is conducted by agitating sludge with air or oxygen to maintain aerobic conditions at residence times ranging from 60 days at 15°C to 40 days at 20°C, with a volatile solids reduction of at least 38 percent.

(2) Air Drying. Liquid sludge is allowed to drain or dry, or both, on under-drained sand beds, or paved or unpaved basins in which the sludge is at a maximum depth of 9 inches. A minimum of 3 months is required, 2 months of which temperatures average on a daily basis above 0°C.

(3) Anaerobic Digestion. The process is conducted in the absence of air at residence times ranging from 60 days at

20°C to 15 days at 35°C to 55°C, with a volatile solids reduction of at least 38 percent.

(4) Composting. Using a within-vessel, static aerated pile or windrow composting methods, the sewage sludge compost is maintained at minimum operating conditions of 40°C for 5 days. For 4 hours during this period the temperature exceeds 55°C. This high temperature phase is an integral element of the overall composting-curing process.

(5) Lime Stabilization. Sufficient lime is added to reach and maintain a pH of 12 for 2 hours of contact.

(6) Other Methods. Other methods or operating conditions may be acceptable if the applicant demonstrates that pathogens and vector attraction of the sewage sludge are reduced to an extent equivalent to the reduction achieved by any of the above methods.

An EPA memorandum defines PSRP as processes which achieve at least a 99% (2 log) reduction in fecal coliform bacteria and a 90% (1 log) reduction in animal viruses, as well as reducing vector attraction.

In cases where separate anaerobic or aerobic digestion follows an extended aeration or oxidation ditch process, the requirements for volatile solids reduction of 38 percent applies to the combined reduction for the separate digester and the extended aeration/oxidation ditch process. Therefore, volatile solids reduction can be determined by comparing the volatile solids of incoming wastewater to volatile solids of the digested sludge.

(1) Sludges prepared to meet the Class B requirements of this section must be processed by means of one of the following alternatives:

(a) Class B Alternative 1.

(i) Seven samples of the sewage sludge shall be collected at the time the sewage sludge is used or disposed.

(ii) The geometric mean of the density of fecal coliform in the samples shall be less than either 2,000,000 Most Probable Number per gram of total solids (dry weight basis) or 2,000,000 Colony Forming Units per gram of total solids (dry weight basis).

(b) Class B Alternative 2.

(i) Aerobic digestion - Sewage sludge is agitated with air or oxygen to maintain aerobic conditions for a specific mean cell residence time at a specific temperature. Values for the mean cell residence time and temperature shall be between 40 days at 20 degrees Celsius and 60 days at 15 degrees Celsius.

(ii) Air drying - Sewage sludge is dried on sand beds or on paved or unpaved basins. The sewage sludge

dries for a minimum of three months. During two of the three months, the ambient average daily temperature is above zero degrees Celsius.

(iii) Anaerobic digestion - Sewage sludge is treated in the absence of air for a specific mean cell residence time at a specific temperature. Values for the mean cell residence time and temperature shall be between 15 days at 35 to 55 degrees Celsius and 60 days at 20 degrees Celsius.

(iv) Composting - Using either the within-vessel, static aerated pile or windrow composting methods, the temperature of the sewage sludge is raised to 40 degrees Celsius or higher and remains at 40 degrees Celsius or higher for five days. For four hours during the five days, the temperature in the compost pile exceeds 55 degrees Celsius.

(v) Lime stabilization - Sufficient lime is added to the sewage sludge to raise the pH of the sewage sludge to 12 after 2 hours of contact.

(c) Class B - Alternative 3. Sewage sludge that is used or disposed shall be treated in a process that is equivalent to a Process to Significantly Reduce Pathogens, as determined by the Department.

(2) Monitoring and Reporting.

(a) Sludge processed to significantly reduce pathogens must be monitored in accordance with the requirements described in the alternative used. Additional monitoring may be required by the Department as a condition of the preparer's permit.

(b) The preparer must submit a report of process monitoring on a form provided by the Department. The frequency of reporting shall conform with the reporting frequency specified in Section 701 of the regulations or as specified in any permit issued for preparation.

Subsection 603. Processes to Further Reduce Pathogens (PFRP). The following are PFRP's:

(1) Composting. Using the within-vessel composting method, the sewage sludge compost is maintained at operating conditions of 55°C or greater for 3 consecutive days. Using the static aerated pile composting method, sewage sludge compost is maintained at operating conditions of 55°C or greater for 3 days. Using the windrow composting method, the sewage sludge compost attains a temperature of 55°C or greater for at least 15 days during the composting period. Also, during the high temperature period, there will be a minimum of five turnings of the windrow. This high temperature phase is an integral element of the overall composting-curing process.

(2) Heat Drying. Dewatered sewage sludge cake is

dried by direct or indirect contact with hot gases, and moisture content is reduced to 10 percent or lower. Sludge particles reach temperatures well in excess of 80°C, or the wet bulb temperature of the gas stream in contact with the sludge at the point where it leaves the dryer is in excess of 80°C.

(3) Heat Treatment. Liquid sewage sludge is heated to temperatures of 180°C for 30 minutes.

(4) Thermophilic Aerobic Digestion. Liquid sewage sludge is agitated with air or oxygen to maintain aerobic conditions at residence times of 10 days at 55–60°C, with a volatile solids reduction of at least 38 percent.

(5) The following may be used to further reduce pathogens only in conjunction with one of the processes listed in Subsection 602 of these regulations:

(a) Beta Ray Irradiation. Sewage sludge is irradiated with beta rays from an accelerator at dosages of at least 1.0 megarad at room temperature (ca. 20°C).

(b) Gamma Ray Irradiation. Sewage sludge is irradiated with gamma rays from certain isotopes, such as Cobalt and cesium, at dosages of at least 1.0 megarad at room temperature (ca. 20°C).

(c) Pasteurization. Sewage sludge is maintained for at least 30 minutes at a minimum temperature of 70°C.

(6) Other Methods. Other methods or operating conditions may be acceptable if the applicant demonstrates that pathogens and vector attraction of the sewage sludge are reduced to an extent equivalent to the reduction achieved by any of the above methods.

An EPA memorandum defines PFRP as the reduction of pathogens to below detectable limits in conjunction with reduced vector attraction. To be equivalent to PFRP, a process must reduce microorganisms to below the following limits: salmonella species, 3 MPN (most probable number); total enteroviruses, 1 PFU (plaque-forming unit); helminth ova, 1 viable ovum; all per 100 mL sludge at 5% solids.

Subsection 603. Class A Sludge - Sludges processed to further reduce pathogens (PFRP).

(1) Sludges prepared to meet Class A requirements must be processed by means of one of the following alternatives. The Class A pathogen requirements in Subsection 603(1)(a-f) shall be met either prior to meeting or at the same time the vector attraction reduction requirements in Subsection 604 (except for 604(f), (g) and (h)) are met.

(a) Class A - Alternative 1.

(i) Either the density of fecal coliform in the

sewage sludge shall be less than 1000 Most Probable Number per gram of total solids (dry weight basis), or the density of *SALMonella* sp. bacteria in the sewage sludge shall be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the sewage sludge is prepared for sale or give away in as bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in Section 700.

(ii) The temperature of the sewage sludge that is used or disposed shall be maintained at a specific value for a period of time.

(A) When the percent solids of the sewage sludge is seven percent or higher, the temperature of the sewage sludge shall be 50 degrees Celsius or higher; the time period shall be 20 minutes or longer; and the temperature and time period shall be determined using equation (2), except when small particles of sewage sludge are heated by either warm gases or an immiscible liquid.

$$D = \frac{1.317(10^8)}{10^{0.1400t}} \quad \text{Eq. 2}$$

Where,

D = time in days.

t = temperature in degrees Celsius.

(B) When the percent solids of the sewage sludge is seven percent or higher and small particles of sewage sludge are heated by either warmed gases or an immiscible liquid, the temperature of the sewage sludge shall be 50 degrees Celsius or higher; the time period shall be 15 seconds or longer; and the temperature and time period shall be determined using equation 2.

(C) When the percent solids of the sewage sludge is less than seven percent and the time period is at least 15 seconds but less than 30 minutes, the temperature and time period shall be determined using equation (2).

(D) When the percent solids of the sewage sludge is less than seven percent; the temperature of the sewage sludge is 50 degrees Celsius or higher; and the time period is 30 minutes or longer, the temperature and time period shall be determined using equation (3).

$$D = \frac{5.007(10^7)}{10^{0.1400t}} \quad \text{Eq. 3}$$

Where,

D = time in days.

t = temperature in degrees Celsius.

(b) Class A - Alternative 2.

(i) Either the density of fecal coliform in the sewage sludge shall be less than 1000 Most Probable Number per gram of total solids (dry weight basis), or the density of *Salmonella* sp. bacteria in the sewage sludge shall be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or give away in a bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in Section 700.

(ii) (A) The pH of the sewage sludge that is used or disposed shall be raised to above 12 and shall remain above 12 for 72 hours.

(B) The temperature of the sewage sludge shall be above 52 degrees Celsius for 12 hours or longer during the period that the pH of the sewage sludge is above 12.

(C) At the end of the 72 hour period during which the pH of the sewage sludge is above 12, the sewage sludge shall be air dried to achieve a percent solids in the sewage sludge greater than 50 percent.

(c) Class A - Alternative 3.

(i) Either the density of fecal coliform in the sewage sludge shall be less than 1000 Most Probable Number per gram of total solids (dry weight basis), or the density of *Salmonella* sp. bacteria in sewage sludge shall be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or give away in a bag or other container for application to the land; or at the time the sewage sludge is prepared to meet the requirements of Section 700.

(ii) (A) The sewage sludge shall be analyzed prior to pathogen treatment to determine whether the sewage sludge contains enteric viruses.

(B) When the density of enteric viruses in the sewage sludge prior to pathogen treatment is less than one Plaque-forming Unit per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to enteric viruses until the next monitoring episode for the sewage sludge.

(C) When the density of enteric viruses in the sewage sludge prior to pathogen treatment is equal to or greater than one Plaque-forming Unit per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to enteric viruses when the density of enteric viruses in the sewage sludge after pathogen treatment is less than

one Plaque-forming Unit per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the sewage sludge that meets the enteric virus density requirement are documented.

(D) After the enteric virus reduction in paragraph (a)(5)(iii)(C) of this section is demonstrated for the pathogen treatment process, the sewage sludge continues to be Class A with respect to enteric viruses when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in paragraph (a)(5)(ii)(C) of this section.

(iii)(A) The sewage sludge shall be analyzed prior to pathogen treatment to determine whether the sewage sludge contains viable helminth ova.

(B) When the density of viable helminth ova in the sewage sludge prior to pathogen treatment is less than one per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to viable helminth ova until the next monitoring episode for the sewage sludge.

(C) When the density of viable helminth ova in the sewage sludge prior to pathogen treatment is equal to or greater than one per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to viable helminth ova when the density of viable helminth ova in the sewage sludge after pathogen treatment is less than one per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the sewage sludge that meets the viable helminth ova density requirement are documented.

(D) After the viable helminth ova reduction in (iii)(C) of this subsection is demonstrated for the pathogen treatment process, the sewage sludge continues to be Class A with respect to viable helminth ova when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in (iii)(C) of this subsection.

(d) Class A - Alternative 4.

(i) Either the density of fecal coliform in the sewage sludge shall be less than 1000 Most Probable Number per gram of total solids (dry weight basis), or the density of Salmonella sp. bacteria in the sewage sludge shall be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or give away in a bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in Section 700.

(ii) The density of enteric viruses in the sewage sludge shall be less than one Plaque-forming Unit per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or give away in a bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in Section 700 unless otherwise specified by the permitting authority.

(iii) The density of viable helminth ova in the sewage sludge shall be less than one per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or give away in a bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in Section 700, unless otherwise specified by the permitting authority.

(e) Class A - Alternative 5.

(i) Either the density of fecal coliform in the sewage sludge shall be less than 1000 Most Probable Number per gram of total solids (dry weight basis), or the density of Salmonella sp. bacteria in the sewage sludge shall be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in Section 700.

(ii) Sewage sludge that is used or disposed shall be treated in one of the Processes to Further Reduce Pathogens described below:

(A) Composting - Using either the within-vessel composting method or the static aerated pile composting method, the temperature of the sewage sludge is maintained at 55 degrees Celsius or higher for three days.

Using the windrow composting method, the temperature of the sewage sludge is maintained at 55 degrees or higher for 15 days or longer. During the period when the compost is maintained at 55 degrees or higher, there shall be a minimum of five turnings of the windrow.

(B) Heat drying - Sewage sludge is dried by direct or indirect contact with hot gases to reduce the moisture content of the sewage sludge to 10 percent or lower. Either the temperature of the sewage sludge particles exceeds 80 degrees Celsius or the wet bulb temperature of the gas in contact with the sewage sludge as the sewage sludge leaves the dryer exceeds 80 degrees Celsius.

(C) Heat treatment - Liquid sewage sludge is heated to a temperature of 180 degrees Celsius or higher for 30 minutes.

(D) Thermophilic aerobic digestion - Liquid sewage sludge is agitated with air or oxygen to maintain aerobic conditions and the mean cell residence time of the sewage sludge is 10 days at 55 to 60 degrees Celsius.

(E) Beta ray irradiation - Sewage sludge is irradiated with beta rays from an accelerator at dosages of at least 1.0 megarad at room temperature (ca. 20 degrees Celsius).

(F) Gamma ray irradiation - Sewage sludge is irradiated with gamma rays from certain isotopes, such as Cobalt 60 and Cesium 137, at room temperature (ca. 20 degrees Celsius).

(G) Pasteurization - The temperature of the sewage sludge is maintained at 70 degrees Celsius or higher for 30 minutes or longer.

(f) Class A - Alternative 6.

(i) Either the density of fecal coliform in the sewage sludge shall be less than 1000 Most Probable Number per gram of total solids (dry weight basis), or the density of Salmonella, sp. bacteria in the sewage sludge shall be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land; or at the time the sewage sludge is prepared to meet the requirements in Section 700.

(ii) Sewage sludge that is used or disposed shall be treated in a process that is equivalent to a Process to Further Reduce Pathogens, as determined by the permitting authority.

(2) Monitoring and Reporting.

(a) Any sludge processed to further reduce pathogens must be monitored in accordance with the requirements described in the alternative used. Additional monitoring may be required by the Department as a permit condition.

(b) Anyone who prepares a Class A sludge must report the results of all monitoring for the processing alternative used on a form provided by the Department. The frequency of reporting shall comply with the reporting frequency described in Section 701 or as specified in the permit.

Subsection 604. Vector Attraction Reduction Requirements.

(1) All sludge prepared for land application and for sale or give away in bulk or bag must meet the requirements of

this subsection for Vector Attraction Reduction in addition to the requirements in Section 700 and in Subsections 402, 602 and 603.

(2) Vector Attraction Reduction requirements may be achieved by application of one of the following processes:

(a) The mass of volatile solids in the sewage sludge shall be reduce by a minimum of 38 percent (see calculation procedures in "Environmental Regulations and Technology - Control of Pathogens and Vector Attraction in Sewage Sludge", EPA-625/R-92/013, 1992, U.S. Environmental Protection Agency, Cincinnati, Ohio 45268).

(b) When the 38 percent volatile solids reduction requirement in (2)(a) cannot be met for an anaerobically digested sewage sludge, vector attraction reduction can be demonstrated by digesting a portion of the previously digested sewage sludge anaerobically in the laboratory in a bench-scale unit for 40 additional days at a temperature between 30 and 37 degrees Celsius. When at the end of the 40 days, the volatile solids in the sewage sludge at the beginning of that period is reduced by less than 17 percent, vector attraction reduction is achieved.

(c) When the 38 percent volatile solids reduction requirement in (2)(a) cannot be met for an aerobically digested sewage sludge, vector attraction reduction can be demonstrated by digesting a portion of the previously digested sewage sludge that has a percent solids of two percent or less aerobically in the laboratory in a bench-scale unit for 30 additional days at 20 degrees Celsius. When at the end of the 30 days, the volatile solids in the sewage sludge at the beginning of that period is reduced by less than 15 percent, vector attraction reduction is achieved.

(d) The specific oxygen uptake rate (SOUR) for sewage sludge treated in an aerobic process shall be equal to or less than 1.5 milligrams of oxygen per hour per gram of total solids (dry weight basis) at a temperature of 20 degrees Celsius.

(e) Sewage sludge shall be treated in an aerobic process for 14 days or longer. During that time, the temperature of the sewage sludge shall be higher than 40 degrees Celsius and the average temperature of the sewage sludge shall be higher than 45 degrees Celsius.

(f) The pH of sewage sludge shall be raised to 12 or higher by alkaline addition and, without the addition of more alkali shall remain at 12 or higher for two hours and then at 11.5 or higher for an additional 22 hours.

(g) The percent solids of sewage sludge that does not contain unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 75 percent based on the moisture content and total solids prior to mixing with other materials.

(h) The percent solids of sewage sludge that contains unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 90 percent based on the moisture content and total solids prior to mixing with other materials.

(i) Sewage sludge shall be injected below the surface of the land.

(i) No significant amount of the sewage sludge shall be present on the land surface within one hour after the sewage sludge is injected.

(ii) When the sewage sludge that is injected below the surface of the land is Class A with respect to pathogens, the sewage sludge shall be injected below the land surface within eight hours after being discharged from the pathogen treatment process.

(j) Sewage sludge applied to the land surface disposal site shall be incorporated into the soil within six hours after application to or placement on the land.

(i) When sewage sludge that is incorporated into the soil is Class A with respect to pathogens, the sewage sludge shall be applied to or placed on the land within eight hours after being discharged from the pathogen treatment process.

(k) The pH of domestic septage shall be raised to 12 or higher by alkaline addition and, without the addition of more alkali, shall remain at 12 or higher for 30 minutes.

(3) Vector Attraction Reduction requirements may also be met by employment of any one of the following practices in lieu of a specific Vector Reduction process found in 604 (2)(a-j).

(a) One of the vector attraction reduction requirements in Subsection 604 (2)(a) through (2)(j) shall be met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site.

(b) One of the vector attraction reduction requirements in Subsection 604 (2)(a) through (2)(h) shall be met when bulk sewage sludge is applied to a lawn or a home garden.

(c) One of the vector attraction reduction requirements in Subsection 604 (2)(a) through (2)(h) shall be met when sewage sludge is sold or given away in a bag or other container for application to the land.

(d) One of the vector attraction reduction requirements in Subsection 604 (2)(i), (2)(j), or (2)(k) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.

(4) Monitoring and Reporting.

(a) Any sludge prepared for land application or for sale or give away in bulk or bag must be monitored for vector attraction reduction according to the conditions

specified in the processes outlined in Subsection 604 (2)(a-j) or practices outlined in Subsection 604 (3)(a-d).

(b) Any person that prepares a sludge for land application or for sale or give away in bulk or bag must report vector attraction reduction monitoring results to the Department on a form provided by the Department. The frequency of reporting must comply with the schedule outlined in Subsection 701 of these regulations or as specified in the permit.

#### SECTION 700. UTILIZATION METHODS.

##### Subsection 701. General Operating Requirements.

(1) Each person that conducts sludge utilization shall comply with all of the following:

(a) The requirements of the Delaware Environmental Protection Act, 7 Del. C., Ch. 60, these regulations and the additional operating requirements for the specific type of operation that are set forth in these regulations.

(b) The plans and specifications in the permit, the terms and conditions of the permit, and any orders issued by the Department.

(c) The Departmental regulations for agricultural utilization, unless the person is operating pursuant to a permit that allows use of the loading rate guidelines for land reclamation, utilization or disposal at landfills, research projects, land disposal, or sludge distribution program, in which case the person shall comply with the applicable guidelines for such operation.

(d) Prior to utilization all sewage sludge shall be stabilized according to a method specified in Section 600.

(e) Before sewage sludge subject to the cumulative pollutant loading rates in Table 402.4 is applied, the Applier shall contact the Department to determine whether sewage sludge subject to the cumulative pollutant loading rates in Table 402.4 has been applied to the site since July 20, 1993.

If such sewage sludge has not been applied to the site since July 20, 1993, the cumulative amount for each pollutant listed in Table 402.4 may be applied to the site in accordance with these Regulations.

If such sewage sludge has been applied to the site since July 20, 1993, and the cumulative amount of each pollutant applied to the site in the sewage sludge since that date is known, the cumulative amount of each pollutant applied to the site shall be used to determine the additional amount of each pollutant that can be applied in accordance with Table 402.4.

(2) Monitoring requirements for all sludge utilization methods.

(3) The monitoring frequency for the parameters identified in Section 402 (tables 402.2-402.3, 402.4, 402.5), 602(1), 603(1) and 604(2) shall be based on the amount of sewage sludge generated, prepared, or applied (in metric tons on a dry weight basis) per 365-day period as follows:

Greater than 0 but less than 290 - once per year

Equal to or greater than 290 but less than 1,500 - once per quarter (four times a year)

Equal to or greater than 1,500 but less than 15,000 - once per 60 days (six times per year)

Equal to or greater than 15,000 - once per month (12 times per year)

(4) The Department may specify additional monitoring in any permit issued for the utilization of sludge.

(5) The Department may reduce the frequency of monitoring for the pollution concentrations in Section 400 and for the pathogen density requirements in Section 600 after two years of monitoring to a minimum of yearly monitoring unless otherwise specified in a sludge utilization permit.

(6) Sampling and analysis shall be conducted in accordance with the requirements of Section 1000.

(7) The sludge generator shall submit to the Department, land applier and landowner annual copies of a chemical analysis of the sludge unless the Department approves a different schedule in the permit.

(8) The sludge generator shall perform and submit to the Department and landowner additional analyses as used in the permit application and design if there has been a significant change (greater than 25%) in the quality of sludge.

(9) The Department may modify the approved sludge application rate based upon review of continuing or additional analyses.

Subsection 701.2. The Agricultural Utilization of Sludge and Septage.

This section applies to the land application of sewage sludges, sludge products, and septage which meet the minimum quality criteria specified in Subsection 402 and pathogen reduction requirements of Section 600, but do not meet the Exceptional Quality standards for general distribution and marketing.

(1) In addition to the requirements of the Procedures for State Review and Approval (Section 400), each application for a permit for agricultural utilization of sludge shall include the following:

(a) A projected three year crop rotation plan, including type of farming operation, type of crop, planting sequence, crop management, and use of the crops.

(b) An operations map showing the location of any ground water monitoring devices that exist or are proposed for the facility.

(c) Evidence that landowner has reviewed and accepted the plan of operation and has been provided with a copy of the Project Development Report and other documents required by these regulations.

(1) Agronomic Rate:

(a) Sewage sludge application rates must be calculated based on the following:

(i) The nitrogen required by the crop to be grown according to University of Delaware Cooperative Extension Service crop fertility recommendations. Crop demand must be based on realistic yield goals determined either through the average of the three highest yields from the previous five years for each field for each specific crop, or Extension recommendations.

(ii) The total crop nitrogen requirement less any nitrogen that will be available from mineralization of previous manure or sludge applications, legumes, or expected manure applications.

(iii) The Plant Available Nitrogen ( $N_p$ ) of the sewage sludge or sludge product shall be calculated at the summation of the ammonia, nitrate and % inorganic Nitrogen mineralized in the first year, bases on a recent rolling average analyses for the sludge source.

$$\text{Equation (1): } N_p = S [No_3^-] + K_v (NH_4^+) + F (No)](10)$$

Where:

$N_p$  = Plant available N from the current year's sludge application only.

S = Sludge application rate (dry mt tons/ha).

$No_3^-$  = Percent nitrate-N in sludge (as percent, e.g. 1% = 1.0).

$K_v$  = Volatilization factor = 0.5 for surface applied liquid sludge, or 1.0 for incorporated liquid sludge and dewatered sludge applied in any manner.

$NH_4^+$  = Percent ammonia-N in the sludge, as percent (e.g. 3% = 3.0).

F = Organic Nitrogen mineralization factor (year 0-1) from Table 702.1 (percentage expressed as a fraction e.g. 20% = .20).

$N_o$  = Percent organic nitrogen in the sludge (as percent e.g. 3% = 3.0).

(iv) If sludge has been applied in previous years the nitrogen available in the current year from each previous application can be calculated as follows:

$$\text{Equation (2): } N_m = (K_m)(N_o)(s)$$

Where:

$N_m$  = The quantity of N mineralized in the year under consideration, in kg/ha.

$K_m$  = Mineralization factor for the year under consideration from Table 702.1 (in kg/mt/% $N_o$ ).

$N_o$  = Percent organic N originally present in the sludge (as percent e.g. 3% = 3.0).

$S$  = Sludge Application rate (mt/ha) in the year under consideration.

(v) If the sludge is only applied one time, the

$N_o$  available in subsequent years is the amount calculated in eq (2). Sites which have received multiple sludge applications must include the summation of currently available  $N_p$  from  $N_o$  mineralization calculations for each previous sludge application.

Table 702-1. Estimated Percentages and Amounts of Organic N Mineralized After Sludge of Various Types are Applied to Soils

| Time after sludge Applic. (years) | Unstabilized Primary and Waste Activated |                        | Aerobically Digested |                     | Anaerobically Digested |                     | Composted |                     |
|-----------------------------------|--|------------------------|----------------------|---------------------|------------------------|---------------------|-----------|---------------------|
|                                   | F % $N_o$ *                              | $K_m$ †‡ kg/mt/% $N_o$ | F % $N_o$            | $K_m$ kg/mt/% $N_o$ | F % $N_o$              | $K_m$ kg/mt/% $N_o$ | F % $N_o$ | $K_m$ kg/mt/% $N_o$ |
| 0-1                               | 40                                       | 4.00                   | 30                   | 3.00                | 20                     | 2.00                | 10        | 1.00                |
| 1-2                               | 20                                       | 1.20                   | 15                   | 1.05                | 10                     | 0.80                | 5         | 0.45                |
| 2-3                               | 10                                       | 0.48                   | 8                    | 0.45                | 5                      | 0.36                | 3         | 0.25                |
| 3-4                               | 5  | 0.22                   | 4                    | 0.21                | 3                      | 0.21                | 3         | 0.25                |
| 4-5                               | 3  | 0.12                   | 3                    | 0.16                | 3                      | 0.20                | 3         | 0.24                |
| 5-6                               | 3  | 0.12                   | 3                    | 0.15                | 3                      | 0.19                | 3         | 0.23                |
| 6-7                               | 3  | 0.12                   | 3                    | 0.15                | 3                      | 0.19                | 3         | 0.23                |
| 7-8                               | 3  | 0.11                   | 3                    | 0.15                | 3                      | 0.18                | 3         | 0.22                |
| 8-9                               | 3  | 0.11                   | 3                    | 0.15                | 3                      | 0.18                | 3         | 0.21                |
| 9-10                              | 3  | 0.11                   | 3                    | 0.15                | 3                      | 0.17                | 3         | 0.21                |
| 10-yr steady state                | 93                                       |                        | 75                   |                     | 56                     |                     | 39        |                     |

\* Percentage of organic N ( $N_o$ ) present mineralized during time interval shown.

† kg N released per metric ton of sludge applied per % organic N in the sludge. For example, application of an anaerobically digested sludge containing 3% organic N at 10 mt/ha would result in the following amounts of N mineralization: year 0, 3%  $N_o$  x 10 mt/ha x 2.0 = 60 kg N/ha; year 1 3%  $N_o$  x 10 mt/ha x 0.80 = 24 kg N/ha; year 2, 3%  $N_o$  x 10 mt/ha x 0.36 = 10.8 kg N/ha.

‡ Multiply kg/mt by 2 to obtain lbs./ton.

(b) For domestic septage - the annual application rate for domestic septage applied to agricultural land, forest, or a reclamation site shall not exceed the annual application rate calculated using equation (b)(1).

$$\text{Equation 1: } AAR = \frac{N}{0.0026}$$

Where:

AAR = Annual application rate in gallons per acre per 365 day period.

N = Amount of nitrogen in pounds per acre per 365 day period needed by the crop or vegetation grown on the land.

~~(2) Only sewage sludge treated by a PSRP or a PFRP, as listed in these regulations, may be applied to agricultural land.~~

~~(3) IN NO CASE SHALL THE CUMULATIVE METALS LOADINGS EXCEED THE LEVELS SET FORTH IN TABLE 2 OF THE GUIDANCE. THE APPLICANT SHALL UTILIZE TABLE 2 IN CONJUNCTION WITH SECTION 500 OF THE GUIDANCE TO CALCULATE THE SITE LIVES FOR THE CONSTITUENT METALS.~~

~~(4) (2) Buffer Zones.~~

(a) Unless treated by PFRP, sewage sludge may not be land applied within the following buffer zones:

- |             |  |
|-------------|--|
| Surface     | Subsurface   |
| Application | Injection  |
| (i)         | Occupied off-site dwelling 200 feet 100 feet                 |
| (ii)        | Occupied on-site dwelling 100 feet 50 feet                   |
| (iii)       | Potable wells 100 feet 100 feet                              |
| (iv)        | Non-potable wells 25 feet 25 feet                            |
| (v)         | Public roads 25 feet 15 feet                                 |
| (vi)        | Property lines 50 feet 25 feet                               |
| (vii)       | Bedrock outcrops 50 feet 25 feet                             |
| (viii)      | Streams, tidal waters, or other water bodies 50 feet 25 feet |

(ix) Drainage ditches 25 feet 25 feet

(b) The Department may require increased buffer distances or may reduce buffer distances, and may set buffer zones between sludge boundaries and other land uses such as wetlands. In making these determinations, the Department may consider adjacent land use, type of sludge, sludge application method, sludge application rate, sludge quality and level of treatment, land slopes, vegetative cover used, the nature of any surrounding bodies of water, and any other factors considered relevant by the Department.

~~(5) (3) Pathogen Control. Sewage sludge may not be land applied in the State unless it has been treated by a process to further reduce pathogens as described in these regulations, or all of the following requirements are met:~~

~~(a) The sewage sludge has been treated by a process to significantly reduce pathogens as defined by these regulations.~~

~~(b) Public access to the sludge application area is controlled for at least 12 months after sludge application to prevent public uses where there is a high probability of ingestion or direct skin contact with sludge.~~

~~(c) When sludge is applied to forage grasses, the grass has been cropped or closely grazed immediately before sludge application, and grazing by animals whose products are consumed by humans shall be prohibited on the sludge application area for at least 1 month.~~

~~(d) Crops for direct human consumption may not be grown on the sludge application area for 2 years subsequent to application of sewage sludge. The Department may waive this provision if there is no contact between the sludge and the edible portion of the crop.~~

~~(a) Sewage sludge and septage treated by a PSRP process as described in Subsection 602, may be land applied in the State with the following restrictions:~~

~~(i) Food crops with harvested parts that touch the sewage sludge/soil mixture and are totally above the land surface shall not be harvested for 14 months after application of sewage sludge.~~

~~(ii) Food crops with harvested parts below the surface of the land shall not be harvested for 20 months after application of sewage sludge when the sewage sludge remains on the land surface for four months or longer prior to incorporation into the soil.~~

~~(iii) Food crops with harvested parts below the surface of the land shall not be harvested for 38 months after application of sewage sludge when the sewage sludge remains on the land surface for less than four months prior to incorporation into the soil.~~

~~(iv) Food crops, feed crops, and fiber crops~~

shall not be harvested for 30 days after application of sewage sludge.

(v) Animals shall not be allowed to graze on the land for 30 days after application of sewage sludge.

(vi) Turf grown on land where sewage sludge is applied shall not be harvested for one year after application of the sewage sludge when the harvested turf is placed on either land with a high potential for public exposure or a lawn, unless otherwise specified by the permitting authority.

(vii) Public access to land with a high potential for public exposure shall be restricted for one year after application of sewage sludge.

(viii) Public access to land with a low potential for public exposure shall be restricted for 30 days after application of sewage sludge.

(ix) Bulk sewage sludge shall not be applied to a public contact site unless the sludge meets exceptional quality standards.

(x) Tobacco is grown or will be grown.

(b) No person shall use spray irrigation equipment to apply sludge unless such person has demonstrated to the Department in his permit application the specific means by which pathogens will be controlled so as not to present a public health hazard. At a minimum, the report shall include the design effectiveness of the proposed bactericidal and viricidal equipment, the means by which aerosol-borne bacteria and viruses will be contained and the impact of wind velocity on the latter's transport offsite or that appropriate buffer zones have been included, and the Department has approved such equipment or areas as part of the permit.

(4) In no case shall the pollutant loading rate to a field exceed the levels set forth in Section 400, Table 402.4 and Table 402.5.

~~(6) (5) The Department may deny an application to apply lime stabilized sludge or high lime content sludge on a specific site if the Department determines that the application will result in the average soil pH on the site exceeding the optimum pH range for the crop to be grown.~~

~~(7) (6) Site characteristics. No person shall apply sludge to a site unless the site complies with all of the following:~~

~~(a) The soils shall have a minimum depth from surface to impermeable strata of 20 inches.~~

~~(b) The site shall have a minimum depth from surface to seasonal high water table of 20 inches. The operator may establish this minimum depth through the use of a tile drain system. An NPDES permit will be required for the discharge from the tile drain. Sites where the minimum depth from surface to seasonal high water table is~~

less than 20 inches but no less than 12 inches may be considered if application to the soil is restricted to:

(i) May, June, ~~or~~ July or August and appropriate vegetation is established and harvested prior to November of the same year, and

(ii) Those periods when actual water table depth is at least 20 inches below the maximum depth of tillage to be used for the vegetation.

(c) Slopes to be utilized for sludge application may not exceed 15 percent, except that the Department may allow slopes of up to 30 percent for forest systems in the permit.

(d) Soil pH is to be adjusted to values of ~~6.5~~ 6.2 or above unless the natural climatic conditions and soil chemistry preclude such values. In these cases, lime additions suitable to the vegetation used are to be applied in conjunction with annual metal monitoring of that vegetation.

(e) For silvicultural application the soil may remain at ambient pH provided sufficient litter exist on the forest tract floor as determined by the Department.

~~(e)(f)~~ If the site is planted with nursery crops that require a pH of less than 6.5, the Department may approve a soil pH of 5.8 or greater in the permit.

~~(f) The areas to receive sludge application shall be clearly marked with stakes or contain other markers before the sludge application.~~

~~(g) Trucks shall be reasonably cleaned on the site to prevent drag out of soil or sludge onto public roads.~~

~~(8)(7)~~ Application to soil.

(a) Sludge shall be spread evenly over the site using conventional agronomic equipment such as manure spreaders, spray equipment, or other applicators, or by commercial equipment specifically designed for sludge application on agricultural land.

~~(b) The sludge applied shall be incorporated into the soil by the end of each working day except under the following circumstances when:~~

~~(i) The sludge has been treated by a PFRP and it is used in a manner approved by the Department; or~~

~~(b) Sludge or products derived from sewage sludge shall be applied to the soil surface or incorporated in a manner that prevents unreasonable nuisance or odor conditions.~~

(c) The sludge applied shall be incorporated into the soil as required in Section 600 or by the end of each working day except under the following circumstances when:

~~(ii)(i)~~ Liquid sludge is surface sprayed, odors and nuisances are controlled, and the Department determines that there will be no adverse impact on the environment or public health; or

~~(iii)(ii)~~ Site management plans such as no till farming or the presence of an established crop precludes sludge incorporation, adequate site features exist to preclude sludge migration from the site, odors and nuisances are controlled, and the Department determines that there will be no adverse impact on the environment or public health.

~~(e)(d)~~ For the surface application of sludge for top or side dressing on hayfields, for pastures, for cover crops, in forests or for no-till crops when the previous no-till crop was harvested for grain in a manner that left adequate crop residue, the Department may either:

(i) Approve a greater than 24 hour time period for incorporating sludge into the soil as part of the permit, or

(ii) Not require incorporation as part of the permit.

(e) The areas to receive sludge application shall be clearly marked with stakes or contain other markers before the sludge application.

(f) Trucks shall be reasonably cleaned on the site to prevent drag-out of soil or sludge onto public roads.

~~(9)(8)~~ Weather.

(a) No person may apply sludge when the ground surface is saturated or covered with snow, or during periods of rain or runoff.

(b) No person may apply sludge when the ground is frozen, unless the Department has approved such application in the permit and all of the following conditions exist:

(i) The slopes at the site do not exceed three percent.

(ii) The site contains sufficient vegetation or a well-established cover crop to prevent runoff of sludge.

(iii) No sludge storage capacity or other means of storage or disposal exists at the generating facility.

(iv) No run-off.

(9) Daily Record Keeping and Reporting Requirements.

(a) Permit applicants must provide the landowner and operator or the proposed site with a copy of the Project Development Report and permit application and information as specified in Section 1100.

(b) Any person that land applies sludge shall make and maintain an operational record for each day that sludge is applied and when any other management activities are conducted at the land application site. The daily operational record shall be recorded on a form supplied by the Department and include the following:

(i) The date, type, and wet and dry weights of the sludge applied.

(ii) The facility from which the sludge originated.

(iii) The transporters of the sludge.

(iv) The particular map location of the area currently being used for land application of sludge, and the areas where sewage sludge was previously applied within 5 years.

(v) A record of any major deviations from the operating plan.

(vi) General daily weather conditions.

(vii) The application rate for sludge.

(viii) A record of all actions taken to correct violations of the Delaware Environmental Protection Act and the Department's regulations.

(ix) Management undertaken, such as planting and harvesting of crops, fertilizers and chemicals added, tillage practices, etc.

(c) When sludge is being stored at the site, the operator shall maintain accurate operational records sufficient to determine whether the sludge is being stored in accordance with the Department's requirements for such operations.

(10) Water Quality Monitoring

(a) If sludge application occurs at agronomic rates, the potential for groundwater contamination should be minimal. However, the Department encourages applicants who plan to land apply sludge to the same site annually to develop a groundwater monitoring program. A groundwater monitoring program will aid in promoting public acceptance of a sludge application project, in demonstrating the safety of the practice, in determining pre-existing groundwater quality, and in generating data on groundwater quality trends at the site over the life of the sludge application project.

In developing a groundwater monitoring program the applicant shall include the following information in the project development report:

i) A description of the proposed locations of the groundwater monitoring wells. The Department recommends the installation of a minimum of three monitoring wells; one well upgradient or otherwise outside the influence of the sludge application site for background monitoring, and two wells within the sludge application site.

ii) Proposed construction design details for all monitoring wells.

iii) Proposed parameters to be analyzed for, and frequency of analysis. At a minimum, the Department recommends semi-annual sampling for the following parameters: depth to groundwater, pH, electrical conductivity, nitrate nitrogen, total phosphorus, and fecal coliform bacteria.

iv) The name of the individual, firm or company which will install the wells. All wells installed pursuant to this Section shall be drilled by drillers licensed and permitted pursuant to Department regulations.

v) Additional requirements may be imposed by the Department for sites that have seasonal application restrictions:

(b) If a groundwater monitoring program is not proposed, then it shall be the responsibility of the applicant to prepare an assessment on the potential for groundwater impact of the project in the Project Development Report. If, based on the assessment, the Department determines that a groundwater monitoring system is necessary, the applicant shall submit a detailed hydrogeologic report and a groundwater monitoring plan in accordance with Subsection 703(6)(7). At a minimum, the groundwater impact assessment report shall provide details on the following factors:

i) Groundwater characteristics (quality, depth, use, flow, gradient);

ii) Soil characteristics (permeability, drainage, variability, structure);

iii) Site characteristics (size, slope, proximity to streams, ditches or other drainage structures, wetlands, and nearby wells);

iv) Other sources of potential contamination.

(10) Annual Record Keeping and Reporting Requirements.

(a) Any person that utilizes sludge by land application shall submit to the Department and landowner an annual operation report on or before February 1 of each year.

(b) The annual operation report, which shall be submitted in a format specified by the Department, shall include the following:

(i) The weight or volume of each type of sludge received.

(ii) The type, weight, and volume of sludge received from each generator location where the sludge originated.

(iii) A copy of the *applier's* current public liability insurance policy.

(iv) Any changes in ownership of the land where the operation is conducted or any change in any lease agreement for the use of such land that may affect or alter the *applier's* rights upon such land.

(v) The annual ground water monitoring evaluation if ground water monitoring is required by the Department.

(vi) A chemical analysis of soil for each field at the facility for those constituents identified in the sludge.

unless otherwise specified by the Department in the permit. The procedure for soil analysis shall be consistent with the Department guidance.

(vii) Any other information required by the Department.

(c) The annual operation report shall also contain a topographic map of the same scale and contour interval as the map required for the initial permit application, showing the field boundaries where sludge has been applied.

Subsection 702 703. Land Reclamation.

~~(1) Additional application requirements. In addition to the requirements of the Procedures for Review and Approval, each application for a permit for land reclamation by sludge shall include the following:~~

~~(a) An operations map showing the location of any ground water monitoring devices that exist or are proposed for the facility.~~

~~(b) A complete revegetation plan for the site, including methods of site preparation, seeding mixtures, and seeding rates.~~

~~(2) Site characteristics. No person shall apply sludge pursuant to a land reclamation permit unless the site complies with the following:~~

~~(a)(1) Slopes to be utilized for sludge application may not exceed 20 percent, exception that the Department may approve slopes up to 35 percent in the permit if the applicant demonstrates to the Department's satisfaction that such slopes will not cause substantial erosion or off-site run-off.~~

~~(3)(2) Application to soil. The operator applicer shall incorporate sludge into the soil within 24 hours unless otherwise specified in Section 600, following surface application.~~

~~(4)(3) Weather.~~

~~(a) The operator shall not apply sludge:~~

~~(i) When the ground is saturated, snow covered, frozen, or during periods of rain or runoff.~~

~~(ii) Between October 15 and April 15, unless a cover crop can be established.~~

~~(b) The Department may approve the storage of sludge between October 15 and May 30 in the permit if the operator makes a satisfactory demonstration that the requirements for storage in these regulations Section 900 are to be met. Storage may not exceed in amount the sludge necessary to reclaim the permitted area that was prepared for sludge application prior to October 15.~~

~~(5)(4) Revegetation.~~

~~(a) Vegetation shall be established on all land where sludge has been incorporated. The standard for successful revegetation shall be the percent ground cover of~~

the vegetation which exists on undisturbed lands that are nearby or adjacent to the area where land reclamation is proposed. In no case shall the Department approve less than 70 percent ground cover of permanent plant species. No more than 1 percent of the area shall have less than 30 percent ground cover. No single or contiguous area exceeding 3,000 square feet shall have less than 30 percent ground cover.

(b) Revegetation shall provide for an effective and permanent vegetative cover capable of self-regeneration and plant succession. Introduced species may be used in the revegetation process when approved by the Department in the revegetation plan. Vegetative cover shall be considered of the same seasonal variety when it consists of a mixture of species that is of equal or superior utility during each season of the year.

(c) Revegetation shall provide a quick germinating, fast growing vegetative cover capable of stabilizing the soil surface from erosion.

(d) Disturbed areas shall be seeded and planted when weather and planting conditions permit but such seeding and planting of disturbed areas shall be performed no later than the first normal period for favorable planting after final grading.

(e) Mulch shall be applied to all regraded areas at rates adequate to control erosion, promote germination of seeds and increase the moisture retention of the soil.

(f) The Department may require a chemical analysis of the vegetation.

(g) Vegetation shall not be harvested for 2 years for food chain use following the application of sludge, unless otherwise approved by the Department.

(6) Water Quality Monitoring. Since the use of sludge for land reclamation is often a one-time or short term application the Department may accordingly waive or reduce groundwater monitoring requirements.

(7) Soils analysis. If the land to which sludge is applied will be used for agriculture, the operator shall conduct a soil analysis 2 years after the application of sludge to the land. The soil analysis shall be consistent with Department guidance.

(8) The Department may impose other restrictions if considered necessary to protect public health and the environment.

(9) All monitoring performed on the sludge utilized at the reclamation site shall be reported to the Department on approved reporting forms as specified in the permit.

Subsection 703. The Land Disposal of Sludge.

~~(1) Additional application requirements. In addition to~~

the requirements of the Procedures for Review and Approval, each application for a permit for land disposal of sludge shall include the following:

(a) A narrative explanation of the reasons that sludge will not be applied in accordance with the Departmental application rate guidelines for agricultural utilization and land reclamation.

(b) A proposed application rate for the sludge and corresponding loading rates for all constituents for which a chemical analysis of sludge is conducted pursuant to Subsection 402(2) of these regulations or for which a soil analysis is conducted pursuant to Subsection 402(3) of these regulations.

(c) A complete justification for the proposed loading rates, including an analysis of the effect of the proposed loading rates over the lifetime of the facility on air, soil, water, vegetation, and other natural resources.

(d) An analysis of background concentrations for all constituents set forth in Subsection 402(2) of these regulations in soil-pore water prior to the disposal of sludge at the facility.

(e) A proposed soil-pore water monitoring plan that meets the requirements of Subsection 703(5) of these regulations including the proposed location, number, and type of sampling devices, frequency of sampling, and sampling constituents for soil-pore water or with soil cores.

(f) A proposed soil monitoring plan that meets the requirements of Subsection 406(4)(b)(vi) of these regulations, including the proposed location, depth of soil sampled, frequency of sampling, and sampling constituents for soil.

(g) A proposed groundwater monitoring plan that meet requirements of Subsection 703(6) through (12) of these regulations.

(2) Site characteristics. No person may dispose of sludge pursuant to a land disposal permit at a site unless the site complies with all of the following:

(a) The site shall have soils that fall within the United States Department of Agriculture textural classes of sandy loam, loam, sandy clay loam, silty clay loam, or silt loam unless otherwise approved by the Department in the permit.

(b) The soils shall have a minimum depth from surface to impermeable strata of 24 inches, unless otherwise approved by the Department.

(c) The site shall have a minimum depth from surface to seasonal high water table of 48 inches, unless otherwise approved by the Department.

(d) Slopes to be utilized for sludge application may not exceed 15 percent, except that the Department may allow

slopes of up to 30 percent in forested areas if approved by the Department.

(e) Soil pH is to be adjusted to values of 6.5 or above, unless the natural climatic conditions and soil chemistry preclude such values. In such cases, lime additions suitable to the vegetation used are to be applied in conjunction with annual metal monitoring of that vegetation.

(3) Application to soil. Sludge shall be incorporated into the soil within 24 hours following surface application.

(4) Weather. The operator shall not apply sludge when the ground is saturated, snow covered, frozen, or during periods of rain or runoff.

(5) Soil-pore water monitoring.

(a) Soil-pore water quality and subsurface flow shall be monitored in a manner approved by the Department in the permit to determine the effects of land disposal activities on the quality of soil-pore water or in incremental depth of soil cores.

(b) Soil-pore water or soil core monitoring shall also meet the following requirements:

(i) Monitoring shall be capable of detecting the vertical migration of sludge constituents under that part of the site where sludge has been or is being applied.

(ii) Monitoring shall be located in unsaturated zones within 36 inches of the soil surface.

(6) Hydrogeologic report. Each application for a permit for land disposal of sludge shall include a hydrogeologic report prepared by a Professional Geologist registered in the State of Delaware which shall contain a description of the geologic and hydrologic characteristics of the site, including:

(a) Stratigraphy;

(b) Lithology of the water table aquifer;

(c) Hydrologic properties of the water table aquifer, including horizontal and vertical hydraulic conductivity, groundwater flow gradient, water table elevations, and a determination of the depth to seasonal high water table including an estimate of seasonal variations;

(d) Elevation interval and lithology of the uppermost, laterally extensive confining unit;

(e) Lithology, elevation interval and hydraulic properties of the uppermost confining aquifer;

(f) Identification of any facilities or structures, such as nearby high capacity wells, that do or may potentially influence groundwater flow characteristics;

(g) Identification and assessment of any nearby activity that may influence groundwater flow characteristics; and

(h) Identification of any activities adjacent to the land treatment site which do or may potentially contaminate

groundwater at the land treatment site, and a description of such activities and associated potential contaminants:

(7) ~~Groundwater monitoring. Each application for a permit for land disposal of sludge shall include a groundwater monitoring plan which shall describe the system to be developed for detecting any impact the land disposal activity may exert on groundwater quality at the site. The groundwater monitoring plan shall include:~~

~~(a) A description of the number and proposed locations of the groundwater monitoring wells;~~

~~(b) Proposed construction design details of all monitoring wells;~~

~~(c) A proposed method for determining background groundwater quality prior to sludge application and on an ongoing basis after sludge is applied to the site, including parameters to be analyzed for;~~

~~(d) The proposed frequency with which groundwater samples from the site will be collected and analyzed;~~

~~(e) The name of the individual, firm or company which shall collect groundwater samples at the site;~~

~~(f) A description of the proposed sampling methods to be used by the sampler(s) in collecting groundwater samples at the site; and~~

~~(g) The name of the proposed laboratory which shall perform analyses on groundwater samples from the site.~~

~~(6) Water quality monitoring.~~

~~(a) Any person that disposes of sludge pursuant to a land disposal permit shall install, operate, and maintain a monitoring system that can detect the entry of any sludge, sludge constituent, or constituent of decomposition into the ground or surface water, which might exceed State or Federal drinking water standards or State Water Quality Standards for Streams.~~

~~(b) The Department may, in the permit, impose additional requirements when the Department determines that such requirements are necessary.~~

~~(c) No person shall construct, install, or use any water quality monitoring system for land disposal activities until that system has first been approved by the Department in writing.~~

~~(7) Number, location, and depth of water quality monitoring points:~~

~~(a) The water quality monitoring system shall consist, at a minimum, of the following:~~

~~(i) At least one monitoring well at a point hydraulically upgradient from the area in which sludge has been or will be disposed.~~

~~(ii) At least two monitoring wells at points~~

~~hydraulically downgradient of the area in which sludge has been or will be disposed.~~

~~(iii) Any surface water monitoring points established by the Department.~~

~~(b) The upgradient and downgradient monitoring wells shall be:~~

~~(i) Sufficient in number, location, and depth to be representative of background water quality.~~

~~(ii) Readily accessible by a road capable of supporting a vehicle with sampling equipment and personnel, unless otherwise approved by the Department in writing as part of the permit.~~

~~(iii) Located so as not to interfere with routine facility operations.~~

~~(iv) Located within 200 feet of the disposal area unless special conditions exist.~~

~~(c) Upgradient monitoring wells shall be located so that these will not be affected by any groundwater contamination, degradation, or pollution from the disposal area.~~

~~(d) Downgradient monitoring wells shall be located so that these will provide early detection of any groundwater contamination, degradation, or pollution from the disposal area.~~

~~(e) All wells installed pursuant to this section shall be by drillers licensed and permitted pursuant to Department regulations.~~

~~(8) Standards for casing of monitoring wells.~~

~~(a) All monitoring wells shall be cased as follows:~~

~~(i) The casing shall maintain the integrity of the monitoring well borehole.~~

~~(ii) The minimum casing diameter shall be 4 inches unless otherwise approved by the Department in the permit.~~

~~(iii) The casing shall be screened or perforated, and packed with gravel or sand where necessary, to enable collection of samples.~~

~~(iv) The annular space above the sampling depth shall be sealed to prevent contamination of samples and the groundwater.~~

~~(v) If plastic casing is used, it shall be threaded and gasket sealed to preclude potential sample contamination from solvent welded joints, unless otherwise provided by the Department in the permit.~~

~~(b) All monitoring well casings shall be enclosed in a protective steel casing that shall:~~

~~(i) Be of sufficient strength to protect the well from damage by heavy equipment and vandalism.~~

~~(ii) Be installed for at least the upper 10 feet of the monitoring well, as measured from the well cap, unless~~

otherwise approved by the Department in the permit.

(iii) Be grouted and placed with a cement collar at least three feet deep to hold it firmly in position.

(iv) Be numbered and painted in a highly visible color.

(v) Protrude at least one inch higher above grade than the monitoring well casing.

(vi) Have a locking cap.

(9) Sampling and analysis parameters.—All persons disposing of sludge pursuant to a land disposal permit shall sample and analyze for the following parameters and groundwater elevations according to a plan approved by the Department in accordance with this subsection:

(a) Nitrate-nitrogen, pH, conductivity, TOC.

(b) Chromium, lead, copper, cadmium, nickel, zinc, cyanide, sodium, and any other reasonable parameters required by the Department in writing.

(c) Water table elevations in monitoring wells, recorded relative to a mean sea level based on United States Geological Survey datum.

(10) Frequency of water quality sampling and analysis.

(a) All persons disposing of sludge pursuant to a land disposal permit shall conduct sampling and analysis to establish background concentrations and groundwater elevations in the following manner:

(i) At least one quarterly sample from each monitoring point shall be taken for at least six months prior to the disposal of any sewage sludge. Samples shall be analyzed for (at a minimum) each parameter specified in Subsection 703(9).

(b) After background concentrations have been established, all persons disposing of sludge pursuant to a land disposal permit shall conduct quarterly monitoring and analysis for each monitoring point for all parameters specified by the Department.

(c) The Department may require additional sampling points or more frequent sampling if necessary to assess the actual or potential effects on surface or groundwater.

(d) Sampling and analytical procedures shall follow the Department's guidelines for quality assurance and quality control.

(11) Reporting of water quality monitoring analysis results.

Analyses of all data required by these regulations shall be submitted to the Department within 60 days of sampling or 15 days after completion of analyses, whichever is sooner, unless the Department approves another time period in the permit.

(12) Groundwater assessment plan.

(a) All persons disposing of sludge pursuant to a land disposal permit shall prepare and submit to the Department a groundwater assessment plan within 30 days after one of the following occurs:

(i) Monitoring by the Department or operator shows groundwater degradation, contamination, or pollution.

(ii) Laboratory analyses of public or private water supplies show the presence of parameters that could reasonably be attributed to the facility.

(iii) The Department requires in writing that a groundwater assessment plan be submitted.

(b) The groundwater assessment plan shall specify the manner in which the operator will determine the existence, quality, quantity, areal extent, and depth of groundwater contamination, the rate and direction of migrating contaminants in the groundwater and the probable cause of contamination. A groundwater quality assessment plan shall be prepared by a registered Professional Geologist. The plan shall contain, at minimum, the following information:

(i) The number, location, size, casing type, and depth of wells, lysimeters, borings, pits, piezometers, and other assessment structures or devices to be used.

(ii) Sampling and analytical methods for the parameters to be evaluated.

(iii) Evaluation procedures, including the use of any previously gathered groundwater quality information, to determine the concentration, rate and extent of any groundwater contamination, degradation, pollution from the facility.

(iv) An implementation schedule.

(c) The groundwater assessment plan shall be implemented upon approval by the Department in accordance with the approved implementation schedule, and shall be completed in a reasonable time not to exceed six months unless otherwise approved by the Department. If the Department determines that the proposed plan is inadequate in any way, it may modify the plan and approve the plan as modified.

(d) Within 45 days after the completion of the groundwater assessment plan, the operator shall submit a report containing all of the new data collected, analysis of the data, and recommendations on the necessity for abatement.

(e) If the Department determines after review of the groundwater assessment report that implementation of an abatement plan is not necessary, the operator shall notify the Department of any proposed modifications to the groundwater monitoring program, if such modifications are

necessary, and begin the implementation of such modifications within 30 days of the Department's approval.

(13) Remediation plan.

(a) All persons conducting land disposal of sludge shall prepare and submit to the Department a remediation plan whenever one of the following occurs:

(i) The groundwater assessment plan prepared and implemented pursuant to Subsection 703(12) shows the following:

A. That the concentration of any monitored parameters exceed primary or secondary limits as given in the State of Delaware Regulations Governing Drinking Water Standards. The Department may consider the parameters and degree of violation in its decision to require preparation of and implementation of the remediation plan.

B. The areal extent and depth of groundwater pollution:

C. The rate and direction of pollution migrating from the facility.

(ii) No groundwater assessment plan has been prepared or implemented, but:

A. Concentrations of any monitored parameters exceed primary or secondary limits as given in the State of Delaware Regulations Governing Drinking Water Standards.

B. The background concentrations for such parameters as determined pursuant to these regulations did not exceed primary or secondary limits as given in the State of Delaware Regulations Governing Drinking Water Standards.

C. The area extent and depth of groundwater pollution, and the rate and direction of pollution migrating from the facility, are sufficiently well known to enable a groundwater pollution abatement plan to proceed without the prior completion of a groundwater assessment plan.

(iii) The facility is causing or allowing pollution of the surface waters of the State by means other than surface discharges.

(iv) The Department requires the submission of an abatement plan.

(b) A remediation plan shall be prepared by a registered Professional Geologist. The plan shall contain, at a minimum, the following information:

(i) The specific methods or techniques to be used to abate surface or groundwater pollution.

(ii) The specific methods or techniques to be used to prevent further pollution of surface or groundwater from the facility.

(iii) A schedule for implementation.

(e) The remediation plan shall be implemented within 60 days of approval by the Department in accordance with the approved implementation schedule. If the Department determines that the proposed plan is inadequate in any way, it may modify the plan and approve the plan as modified.

(d) The remediation plan shall be continued until the Department states in writing, based on monitoring by the Department and the operator, that the cause of surface or groundwater pollution has been abated, and the groundwater quality remediation is complete.

(14) Water quality records. All persons subject to the requirements of this subchapter shall retain records of all analyses and evaluations of monitoring data and groundwater elevations required under these regulations, until release of the bond, and shall make such records available to the Department upon request.

(15) Metal uptake.

(a) Prior to harvesting any crop that may be consumed by humans or animals, and which was grown on any land to which sludge has been applied pursuant to a land disposal permit, the operator shall submit to the Department, until release of the bond, an analysis of a representative sample of such crop for arsenic, lead, cadmium, zinc, copper, nickel, chromium, molybdenum, mercury, selenium, and other chemical constituents present in the sludge, as defined by the Department.

(b) If based upon accepted scientific guidelines, recommendations, or regulations, the crop is deemed unacceptable for human or animal consumption or other productive use, such crop shall be processed or disposed in a manner approved by the Department which precludes introduction of the crop into the food chain.

(16) Recording of affidavit.

As a condition of any permit under this subsection the titleholder must execute and record in the appropriate County Office of Recorder of Deeds an affidavit in a form approved by the Department which notifies prospective purchasers that the property has been used for the disposal of sludge.

Subsection 706 704. Research Projects.

(1) The Department may issue permits to utilize sludge as part of legitimate research projects to be carried out by qualified persons. Research projects may be designed to improve current sludge utilization methods, develop new methods, determine the environmental or health effects of sludge utilization, or all of these.

(2) The Department may allow the application of

sludge at high rates which exceed crop nitrogen requirements and/or the heavy metals limitations stated in the guidance and these regulations, on land specifically set aside for research purposes.

(3) The Department may allow use of unstabilized sludge if appropriate precautions are taken to assure that viable pathogens do not enter ground water, surface water, or in any way adversely affect the public health.

(4) The Department may allow the growth of crops such as vegetables and tobacco if the purpose of the research is to determine the effect of sludge on these crops, and the crops are not allowed to enter the human food chain.

(5) Applications for permits shall include five copies of a complete description of the project. After a preliminary review, the Department may request such additional information as is necessary to evaluate and document the project.

(6) As a condition of any permit under this section the titleholder must execute and record in the appropriate County Office of Recorder of Deeds an affidavit in a form approved by the Department which notifies prospective purchasers that the property has been used to conduct sludge utilization research.

#### Subsection 704 705. Sludge Distribution and Marketing Programs.

~~Distribution and marketing refers to the give away or sale of sludge or sludge products to commercial growers, landscaping firms, parks, highway department, cemeteries, golf courses, the general public, and other potential users, for use as fertilizers or soil amendment agents. All applications for a distribution and marketing program must demonstrate how the applicant plans to comply with these regulations. The permit application shall be filed by the owner, or operator of the sludge distribution facility. The sludge distribution facility shall be deemed to be that facility which provides treatment by a process to further reduce pathogens (PFRP) to the sludge or sludge product. In order to obtain a distribution and marketing permit, the applicant must comply with the specific requirements of Section 1100 and the following more general requirements:~~

~~(1) Only sludge or sludge products which have been treated by a Process to Further Reduce Pathogens (PFRP) are acceptable for distribution and marketing. This requirement may be waived by the Department for sludge products or residuals generated through an industrial or commercial process (such as water treatment residuals) providing the applicant can demonstrate that the sludge product or residuals are not derived from a pathogen-containing waste stream.~~

~~(2) Continuing analysis of sludge.~~

~~(a) The sludge distribution facility shall submit to the Department every month a chemical analysis of the sludge or sludge product in accordance with the requirements of the permit, unless the Department approves a different schedule in the permit.~~

~~(1) Quality Criteria:~~

~~(a) Sludge and sludge products for Distribution and Marketing must meet one of the PFRP pathogen reduction standards specified in Subsection 603, vector attraction methods described in Subsection 604 (2) as alternative a through h, and the Pollutant Concentration Limits in Table 402.3 at the time of distribution.~~

~~(b) All sludge or sludge products shall be dried or otherwise amended to a minimum of twenty percent solids prior to distribution or marketing.~~

~~(2) Monitoring Requirements for Distribution and Marketing:~~

~~(a) A quality control program approved by the Department shall be instituted to assure that all treated sludge and sludge products to be distributed meet the Department's standards regarding the destruction of primary pathogen organisms (PFRP) and the limitations for heavy metals and other contaminants. During the stabilization process, temperature shall be monitored regularly until temperatures recorded in the material (or off-gas from a heat-drying process) exceed the level and duration required for adequate pathogen destruction. For aerobic stabilization processes, oxygen levels shall also be monitored frequently to assure that aerobic conditions are maintained. Additional monitoring of the treatment process may be required on a case-by-case basis.~~

~~(b) The sludge or sludge products shall be tested according to the frequencies specified in Subsection 401, unless the Department requires a different monitoring as a permit condition.~~

~~(b)(c) The sludge distribution facility shall perform and submit to the Department additional analyses if there has been a significant change in the quality of the sludge or sludge products.~~

~~(3) Records and recordkeeping.~~

~~(a) Any person that distributes and markets sludge or sludge products shall keep a log of all persons that receive more than ten (10) cubic yards of material per year. A more stringent recordkeeping program may be required for the limited distribution of sludge or sludge products.~~

~~(b) Before distributing sludge or sludge products to any person who will utilize more than 100 tons of the material in a twelve (12) month period, the permittee shall submit a plan to the Department which addresses the~~

following:

- (i) The end use(s) of the material
- (ii) Maximum application rates
- (iii) Total amount of material to be utilized
- (iv) Storage practices
- (v) Transportation methods

(4) Application limitations.

(a) No person who receives or applies sludge or sludge products pursuant to a distribution and marketing program may:

(i) Apply sludge or sludge products to land where root vegetables or vegetables which are eaten raw are grown or will be grown within twenty-four (24) month.

(ii) Exceed the application rates for particular uses as listed in the instructional materials provided with the product, or otherwise use the product in any manner counter label directions.

(iii) Apply sludge or sludge products to land where tobacco is grown or will be grown.

(b) No sludge or sludge products may be stored or applied so as to cause surface or groundwater pollution, runoff/runoff, cause odor, adversely affect the food chain, attract vectors, or adversely affect private or public water supplies.

(5) All sludge or sludge products shall be dried or otherwise amended to a minimum of twenty percent solids prior to distribution or marketing.

Subsection 705 706. Utilization or Disposal of Sludge at Sanitary Landfills.

(1) The Department may issue permits for the utilization of sludge as a fertilizer and soil conditioner on completed areas of a landfill if the proposed project is in compliance with applicable requirements of these and other state regulations. The Department may grant exceptions to these requirements if the applicant can demonstrate that public health hazards, deleterious effects on the environment, or nuisances will not result.

(2) The Department may issue permits for the disposal of sludge in a landfill, or for its use as a portion of the daily, intermediate, or final cover material, if all of the following requirements are met:

(a) The landfill is operating in compliance with state law and regulations.

(b) The proposed sludge project does not violate any of the conditions of the operating permits issued for the landfill and the permitting agency has issued a statement of approval for the proposed project.

(c) The landfill possesses adequate on-site equipment capable of handling the incoming sludge.

(d) The owner/operator of the landfill approves the project.

(e) The results of a laboratory analysis of a representative sample of the sludge which was obtained not more than 6 months before submission of the application are submitted to the Department. The analysis shall include, as a minimum, Toxicity Characteristic Leachate Procedure (TCLP), percent solids, pH, and the dry weight concentration of total nitrogen, cadmium, copper, mercury, nickel, lead, and zinc. The Department may require more frequent analyses, and analyses for other sludge constituents.

(f) The sludge may not contain free liquids. To assure this, a monitoring program shall be instituted to regularly test the sludge for free liquids using either the EPA Plate Test or the EPA Gravity Test as described below. The Department may waive this requirement if specific approval is provided in the statement required pursuant to Subsection 705(2)(b).

(g) If the sludge fails the free liquid test, it may be mixed with soil or other approved materials and retested. The mixing operation would require prior approval by the Department.

(h) After the sludge or sludge/soil mixture passes the free liquid test, it may be disposed of or used in the landfill, or used as specified in the Permit.

(i) The operations may not cause excessive or persistent odors.

(3) Free Liquid Tests. Either of the following tests may be used to determine the presence of free liquids:

(a) EPA Plate Test. Place a 1 to 5 kilogram (2.2 to 11.0 lbs.) sample of waste on a level or slightly sloping plate of glass or other similarly flat and smooth solid material for at least 5 minutes. If a liquid phase separation is observed, the waste contains free liquids.

(b) EPA Gravity Test. The test protocol calls for a 100 ml representative sample of the waste from a container to be placed in a 400 micron conical paint filter for 5 minutes. The filter specified is a standard paint filter which is commonly available at hardware and paint stores. The filter is to be supported by a funnel on a ring stand with a beaker or cylinder below the funnel to capture any free liquid that passes through the filter. If any amount of free liquid passes through the filter, the waste is considered to hold free liquids.

(1) Sludge utilized or disposed of in a sanitary landfill must not contain free liquids and must contain a minimum of 20% solids as determined by the EPA paint filter test.

(2) Utilization or disposal of sludges governed by these regulations must comply with 40 CFR part 258, the "Regulations Governing Solids Waste" and Delaware Solid

Waste Authority *Policy on Special Solid Wastes*.

(3) Persons with a valid permit from the Delaware Solid Waste Authority or the Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management to dispose or utilize sludge at an approved landfill are exempt from the permit requirements of these regulations.

(4) Reporting and Record Keeping.

(a) Unless specified in an NPDES or Ground Water Discharges Permit, all facilities must record the volume of sludge generated and disposed of on a dry weight basis under this subsection.

(b) Unless specified in an NPDES or Ground Water Discharges Permit, all facilities must report on a yearly basis the volume of sludge generated and disposed of under this subsection.

## SECTION 800. TRANSPORTATION OF SLUDGE OR SEPTAGE.

### Subsection 801. General Requirements.

(1) For the purpose of this section, sludge is and septage are divided into three types as shown in the table below.

| <u>Sludge Type</u> | <u>Percent Solids</u> |
|--------------------|-----------------------|
| Liquid             | Less than 15          |
| Cake               | 15 - 35               |
| Dried              | Greater than 35       |

(2) The Department may issue permits to transport sludge off-site if the Department approves of the equipment to be used, the operations plan, and the destination of the sludge.

(3) Liquid sludge or septage can be pumped and transported by pipeline. If liquid sludge is transported by truck, rail, or barge, closed watertight vessels shall be used such as tank trucks and railroad tank cars or other vessels which can provide equivalent protection against spills and leakage.

(4) ~~Sludge~~ Cake may be transported in watertight boxes, such as dump trucks properly sealed to prevent leaks, or cement type vehicles. Unless the applicant demonstrates equivalent protection against spills and leakage, when sludge cake is transported in dump trucks, the following standards shall be met:

(a) The trucks shall be equipped with splash guards firmly attached horizontally at the front and rear of the trailer;

(b) Each splash guard shall cover at least 25 percent of the trailer's open area; and

(c) A minimum 2 feet of freeboard shall be maintained between the sludge and the top of the trailer

unless the top of the trailer is completely sealed.

(5) The Department may require certain cake sludges to be transported as liquid sludge.

(6) Dried sludge may be transported in open boxes, such as dump trucks, which are properly sealed to prevent leakage. The trucks shall be covered with tarps or the equivalent.

(7) All vehicles used to transport sludge or septage shall be operated and maintained so as to be in compliance with all state and federal regulations and not present a hazard to human health or the environment through unsafe vehicle conditions. The permittee is responsible for the operation and maintenance of all vehicles operated under the permit.

(8) All transporters of sludge or septage shall submit to the Department a plan for the prevention, control, and cleanup of accidental discharges. No transportation permit will be issued until such a plan has been submitted to and approved by the Department.

(9) All transporters shall at all times maintain commercial automobile liability insurance with a combined single limit of at least \$100,000, and shall submit a Certificate of Insurance demonstrating compliance with this regulation. All persons subject to these regulations that were permitted to transport in Delaware before the adoption of this requirement shall be subject to the requirement upon renewal of their permit, or 90 days after adoption of the part, whichever is first.

### Subsection 802. ~~Information Required for Permit Application for Transportation Off-site.~~

An applicant for a Permit to transport sludge or septage in the State shall submit copies of the following information along with the initial application forms supplied by the Department:

(1) A description of the sludge to include the source of the sludge, the quantity to be transported, and any treatment the sludge has undergone before transportation (for example anaerobic digestion, aerobic digestion, lime stabilization, composting, or dewatering).

(2) Results of a laboratory analysis of a representative sample of the sludge which was obtained not more than 6 months before submission of the application unless these results would be submitted as a part of the land application program. The analysis shall include, as a minimum, percent solids, pH, and the dry weight concentration of total nitrogen, ammonium, nitrate, total phosphorous, total potassium, cadmium, copper, mercury, nickel, lead, ~~and zinc, arsenic, selenium, and molybdenum.~~ The Department may require more frequent analyses and analyses for other sludge constituents if considered necessary to adequately

assess the potential public health, environmental, and nuisance impacts of the project. The Department will waive the requirement for domestic septage.

(3) A description of all equipment to include collection, short-term holding, handling, and wash down equipment, as well as a detailed description of the transport vehicles to include type, size, number, and all modifications made to prevent spills and leaks.

(4) An operations plan to include transportation route, days and hours of operation, spill reporting and cleanup plans, plans to keeping transportation vehicles clean, and recordkeeping procedures.

(5) The destination of the sludge and a description of what is to be done with the sludge at the destination.

(6) Other relevant information requested by the Department.

#### SECTION 900. STORAGE.

Subsection 901. General Requirements. Adequate storage capacity for sludge is recognized as an integral and necessary element of an acceptable sludge management program. ~~When feasible, storage shall be limited to permanent facilities, specifically designed and constructed to safely contain sludge without resulting in public health or environmental problems, or creation of nuisance conditions. Facilities for the temporary storage of sludge shall be authorized only as an interim measure to provide sufficient time for the location, authorization, design and construction of permanent sludge storage facilities. The Department may deny authorization to construct temporary storage facilities if it determines that the applicant or the generator is not actively pursuing efforts to secure adequate permanent storage facilities, or for other good cause. The Department may issue permits for the construction and operation of temporary or permanent sludge storage facilities. A facility is a temporary facility if it exists for less than 1 year, or it is used for storage for less than 6 months. A facility is a permanent facility if it is not a temporary facility. Portable equipment used for the short-term holding of sludge (i.e. dumpsters and roll-offs) shall not be considered as storage facilities under this section provided this equipment is included in the list of equipment provided in Subsection 802(3).~~ Storage facilities are to be used as proactive staging areas for sludge or sludge products and not to be used for final or permanent disposal. Storage facilities used in a manner that constitutes final or permanent disposal shall be classified a surface disposal unit and subject to the requirements of *The Regulations Governing the Disposal of Solid Waste in Delaware.*

(1) The Department may issue permits for the

construction and operation of temporary or permanent sludge storage facilities.

(a) A facility is a temporary facility if it exists for less than one (1) year or it is used for storage for less than six (6) months in any one year.

(b) A facility is a permanent facility if it is not a temporary facility.

(2) Unless governed by another permitting authority, facilities for the temporary storage of sludge unless authorized only as an interim measure to provide sufficient time for the location, authorization, design and construction of permanent sludge storage facilities.

(3) The Department may deny authorization to construct temporary storage facilities if it determines that the applicant or the generator is not actively pursuing efforts to secure adequate permanent storage facilities, or for other good cause.

(4) When feasible, storage shall be limited to permanent facilities, specifically designed and constructed to safely contain sludge without resulting in public health or environmental problems, or creation of nuisance conditions.

(5) Portable equipment used for the short-term holding of sludge (i.e., dumpsters and roll-offs) shall not be considered as storage facilities under this Section provided this equipment is included in the list of equipment provided in Subsection 802(3).

#### Subsection 902. Temporary Sludge Storage Facilities.

Temporary sludge storage facilities shall be designed and constructed in accordance with the following specifications:

(1) Storage facilities shall not be placed in flood prone areas.

(2) Storage facilities within the 100-year floodplain shall be evaluated as to potential effects on adjoining landowners.

(3) Storage facilities shall be located on soils of low to moderate permeability or on soils that seal through sedimentation and biological action. If a storage facility is proposed on other soils, the Department shall require permeability tests or use of an impermeable membrane liner or soil sealant, or all of these.

(4) The minimum design volume of a storage facility which is not completely enclosed shall be the volume of sludge to be stored plus the expected volume of precipitation during the period of storage minus expected evaporation on the pond surface plus the volume of the maximum expected 25 years, 24 hours precipitation event.

(5) Storage facilities shall be constructed of:

(a) Suitably compacted soils; or

(b) Manufactured materials such as asphalt, steel, reinforced concrete; or

(c) Fiberglass; or

(d) Other materials approved by the Department.

(6) Storage facilities made by constructing an above ground embankment shall meet the following conditions:

(a) The minimum combined slopes of the embankment shall be five horizontal to one vertical with the wet side not steeper than 2:1 and the dry side not steeper than 3:1.

(b) Embankments having a height of 14 feet or less shall have a minimum top width of 8 feet. Embankments having a height of 15 feet to 19 feet shall have a minimum top width of 10 feet.

(c) The design height of the embankment shall be increased by the amount needed to insure that the design top elevation is maintained after all settlement has taken place. This increase may not be less than 5 percent when compaction rollers are used and not less than 10 percent when bulldozers or scrapers, or both, are used.

(7) The minimum top elevation of the facility shall be 10 percent above the design depth after settlement. A minimum of one foot of freeboard must be provided in all cases. These provisions may be waived by the Department, or the freeboard requirements reduced if the facility design includes secondary containment capability, and the accumulated liquids are routinely removed from the facility.

(8) The side slopes of an excavated storage facility may not be steeper than 1:1.

(9) Storage facilities constructed by both the embankment and excavation method shall meet all of the requirements for above ground embankments of these regulations if the design depth of the sludge impounded against the embankment is 3 feet or more.

(10) Public access to the storage facility shall be controlled.

(11) The storage facility shall be located in a relatively level area (usually less than 5 percent slope) and shall be located at least 150 feet from any drainage ditch, swale, or gully, and bermed to prevent run-on or surface water. Areas with slopes greater than 5 percent may be deemed suitable for storage provided that diversion ditches, additional buffer distances, or other provisions can be installed to further control storm water in the areas of the storage facilities.

(12) The cell floor shall be located at least 2 feet above the maximum seasonal high ground water elevation.

(13) Adequate specific conditions are included to control odors and potential nuisances.

#### Subsection 903. Permanent Storage Facilities.

Permanent storage facilities shall be designed and constructed in accordance with all the requirements listed for temporary storage facilities in these regulations with the following additions:

(1) The facility shall be lined to prevent loss of materials to ground waters. Acceptable liners shall include:

(a) 1-foot thick clay or other suitable material with an installed permeability of  $1.0 \times 10^{-7}$  cm/sec. or less;

(b) 2-foot thick clay or other suitable material with an installed permeability of  $1.0 \times 10^{-6}$  cm/sec or less;

(c) 2-foot thick compacted soil with an installed permeability of  $1.0 \times 10^{-5}$  cm/sec. or less in combination with an artificial liner at least 30 mil in thickness with a permeability of  $1.0 \times 10^{-7}$  cm/sec. or less; or

(d) Other manufactured facilities including but not limited to asphalt or reinforced concrete structures, steel tanks, fiberglass tanks, or their equivalent.

(2) A ground water monitoring program shall be conducted in accordance with a plan approved by the Department. At a minimum, three wells, one upgradient and two downgradient of the facility, shall be installed. The Department may waive this provision for facilities which store sludge in above ground manufactured facilities such as tanks or similar structures.

(3) The Department may approve the storing or stockpiling of dried sludge on a storage pad without groundwater monitoring if the pad meets the Department's standards for permanent storage facility liners and all runoff from the pad is collected and disposed of in a manner approved by the Department.

(4) Other methods of storing or stockpiling dried sludge may be approved by the Department if the Department determines that they do not have significant potential to cause nuisances or adversely affect the public health or the environment.

(5) If the facility is constructed after the date when these regulations are adopted by the Department a 1,000 foot buffer zone shall be maintained between the sludge processing or storage area, or both, and the nearest inhabited off-site dwelling. This buffer distance may be reduced if the Department considers that the facility has adequate specific conditions to control odors and potential nuisances.

#### Subsection 904. Applications for a Storage Permit.

Applications for permits to store sludge shall include the following information:

(1) Written permission from the landowner or landowners and evidence of zoning approval as required by

7 Del. Code 6003(c) and Section 1300 of these regulations.

(2) Results of a laboratory analysis of a representative sample of the sludge which was obtained not more than 6 months before submission of the application. The analysis shall include, as a minimum, ~~percent solids, pH, and the dry weight concentration of total nitrogen, ammonium, nitrate, total phosphorous, total potassium, cadmium, copper, mercury, nickel, lead, and zinc~~ the metals and nutrients parameters found in Section 400 of these regulations. The Department may require more frequent analyses and analyses for other sludge constituents if considered necessary to adequately assess the potential public health and environmental impacts of the project.

(3) A site specific topographic map of sufficient scale to include:

- (a) The areal extent of the site;
- (b) The property boundaries;
- (c) The size and location of the storage facility;
- (d) The location of any streams, springs, or seeps in the area;
- (e) The residences or buildings on the site or bordering on the site;
- (f) Any roads on the site;
- (g) The location of any wells on the site or within 1/2 mile of the site; and
- (h) The location of all soil tests, soil borings, or test pits (attach test results).

(4) A tax map of the site showing the owner's name, site acreage, and property identification number.

(5) Evidence showing the frequency of flooding at the site based on available flood maps and other information along with an evaluation of stormwater management for the facility.

(6) The source and volume of sludge to be stored.

(7) Design volume calculation.

(8) For facilities constructed of earthen material, and for facilities constructed or installed below grade, the following information shall be submitted:

(a) Soil permeability test results both on the soil used to construct side slopes and at the proposed depth of the facility.

(b) Representative test borings or test pits on the site, to include a description of the texture, color, and evidence of mottling of the soils encountered, and the depth to the ground water. The interpretation of test pit or boring information shall be made by a qualified person.

(9) Evidence showing the maximum seasonal high ground water elevation.

(10) The specifications of any liners or soil sealants, if required.

(11) Detailed construction specifications.

(12) Method of restricting public access to the site.

(13) An operations plan to include a description of all sludge handling equipment, daily operating procedures, days and hours of operation, an odor and nuisance control plan, emergency plans, and recordkeeping procedures.

(14) A description of the truck cleaning facility.

(15) For permanent facilities constructed of earthen materials, or for facilities constructed or installed below grade, the following information shall be submitted:

(a) Adequate test boring logs, at a minimum of three per 10 acres. These shall be specific as to the soil, sediment, and rock types encountered, depth of groundwater at completion and at 24, 48, and 72 hours after completion, and depth of auger refusal, if applicable. The location of each boring shall be accurately mapped.

(b) Description of the geology at the site, including a discussion of the geologic formations directly involved, the present and future use of these formations as a ground water source and their relationship to underlying formations, providing cross sections based on the information compiled from borehole data.

(c) Hydraulic characteristics of the site, including a ground water contour map, superimposed on a topographic map, showing the location of the water table and the direction and rate of ground water flow, a discussion of the infiltration capacity of surface soils, and the percolation capacity of subsurface soils.

(d) A proposed ground water monitoring program consisting of at least three wells, one upgradient and two downgradient of the facility.

(e) A sediment and erosion control plan for the site.

(16) For manufactured facilities, the following information shall be submitted:

(a) Information on the structural materials to be used;

(b) Design specifications, such as structural capacity, maximum load, restrictions on use, and dimensions;

(c) Installation or construction techniques and procedures;

(d) A plan for cleaning and periodic inspection of the facility for leaks or other structural defects;

(e) A contingency plan for repairs of the facility, if necessary.

(17) For above ground enclosed facilities, a plan for controlling emission gases.

(18) Other relevant information requested by the Department.

## Subsection 905. Temporary Stockpiling.

The Department may authorize the temporary stockpiling of sludge on a permitted utilization site provided that the following conditions are satisfied:

- (a) The sludge shall be utilized on the site within 7 days of delivery to the site;
- (b) The sludge has been dewatered to a minimum solids content which will allow it to pass the free liquids test under Subsection 705.
- (c) The Department determines that the stockpile area is situated in an area where runoff is adequately controlled and odor or other nuisance conditions do not occur.
- (d) The Department may approve stockpiling beyond 14 days if adequate covering or shelter is provided for the material.

## SECTION 1000. TREATMENT.

~~Subsection 1001. PSRP and PFRP. The Department may issue a permit to operate a facility for the treatment of sludge by a process to significantly reduce pathogens or a process to further reduce pathogens as described in Subsection 600 if it can be determined that the following conditions will be met:~~

- ~~(a) The treatment process shall meet the performance standards for pathogen control contained in these regulations.~~
- ~~(b) Health hazards, environmental degradation, or nuisances do not result from the operation of the facility.~~
- ~~(c) The treatment process does not contaminate the sludge to the extent that subsequent utilization of the treated sludge presents a public health hazard or danger to the environment.~~
- ~~(d) If the facility is constructed after the date when these regulations are adopted by the Department, a 1,000 foot buffer zone shall be maintained between the sludge processing or storage area and the nearest inhabited off site dwelling. This buffer distance may be reduced if the Department considers that the facility has adequate specific conditions to control odors.~~

## SECTION 1000. SAMPLING AND LABORATORY ANALYSES.

The Department recognizes that sludge analysis is difficult due to the inherent complexity of sludge matrices. Sludge is rich in organic matter and highly variable in physical and chemical properties. However, sampling accuracy can be greatly enhanced if the correct protocol is established for the collection, storage, transportation, and

analysis of the sludge sample. The Department may reject the method of analysis if it determines that the method of analysis is inaccurate, or for any other good cause.

## Subsection 1001. Sample collection and Analysis

(1) Sample Collection. All ~~sludge generating facilities generators and preparers~~ shall develop a sludge sampling program which addresses random and cyclic variations within the sludge stream. ~~The applicant generator or preparer~~ must receive Department approval prior to execution of this program. The EPA publication *POTW Sludge Sampling and Analysis Guidance Document* may be helpful in establishing a sampling and analysis program. Specifically, the program shall address, with respect to both stabilized and unstabilized sludges, the following:

- (a) Sampling equipment, personnel, and containers, including set-up, tear-down and cleaning procedures
- (b) Representative sampling (collection points, compositing method, frequency and timing of sampling)
- (c) Sample preservation
- (d) Recordkeeping/logbook
- (e) ~~Transportation of samples~~ Transfer and Chain-of-Custody Samples

(2) Sample Analysis. ~~Two major references are available for the analysis of sludge. Presently the EPA recommends use of the methods listed in the manual "Test Methods for Evaluating Solid Waste" (SW-846, Nov. 1986, 3rd Ed.). In addition, the EPA has developed draft methods for analyzing organics in sludge; these draft methods can be found by referencing 40 CFR Part 136. All laboratory results submitted to the Department must list the method used for analysis. The laboratory must be required to submit a documented Quality Assurance (QA) program for Department approval; the QA program must identify sampling and test procedures in sufficient detail so as to allow a technical evaluation. All sludge generating facilities shall submit a description of the proposed sludge analysis program, which shall address:~~

- ~~(a) Laboratories used, addresses, qualifications~~
- ~~(b) Parameters analyzed at each laboratory for each medium (water, soil, sludge)~~
- ~~(c) QA/QC procedures utilized, results of procedures~~
- ~~(d) Methodologies employed, citation for methodologies~~

~~The applicant must receive Department approval prior to execution of this program.~~

(2) Methods in the publications listed below shall be used to analyze samples of sewage sludge. The publications

are listed as they existed on the effective date of this Regulation. Notice of and change in the listed methods will be published in the *Federal Register*. The Department will make a sincere effort to notify permittees of any testing method changes; however, it is the responsibility of all parties governed by these regulations to perform analysis using current EPA approved testing methods.

(a) Enteric viruses. ASTM Designation: D 4994-89, "Standard Practice for Recovery of Viruses From Wastewater Sludges", 1992 Annual Book of ASTM Standards: Section 11 - Water and Environmental Technology.

(b) Fecal coliform. Part 9221 E. or Part 9222 D., "Standard Methods for the Examination of Water and Wastewater", 19th Edition, 1992.

(c) Helminth ova. Yanko, W.A., "Occurrence of Pathogens in Distribution and Marketing Municipal Sludges", EPA 600/1-87-014, 1987.

(d) Inorganic pollutants. "Test Methods for Evaluating Solid Waste, Physical; Chemical Methods", EPA Publication SW-846, Second Edition (1982) with Updates I (April 1984) and II (April 1985) and Third Edition (November 1986) with Revision I (December 1987).

(e) Salmonella sp. bacteria. Part 9260 D., "Standards Methods for the Examination of Water and Wastewater" 18th Edition, 1992. Kenner, B.A. and H.P. Clark, or "Detection and Enumeration of Salmonella and Pseudomonas aeruginosa", Journal of the Water Pollution Control Federation, Vol. 46, No. 9, September 1974, pp. 2163-2171.

(f) Specific oxygen uptake rate. Part 2710 B., "Standard Methods for the Examination of Water and Wastewater" 18th Edition, 1992.

(g) Total, fixed, and volatile solids. Part 2540 G., "Standard Methods for the Examination of Water and Wastewater", 18th Edition, 1992.

~~(3) The Department may require the laboratories utilized for sludge, soil, and groundwater analyses to be certified and may charge an annual fee for certification.~~

(3) All laboratory results submitted to the Department must list the method used for analysis. The laboratory may be required to submit a documented Quality Assurance (QA) program for Department approval; the QA program must identify sampling and test procedures in sufficient detail so as to allow a technical evaluation. All sludge generating facilities shall submit a description of the proposed sludge analysis program, which shall address:

(a) Laboratories used, addresses, qualifications

(b) Parameters analyzed at each laboratory for each medium (water, soil, sludge)

(c) QA/QC procedures utilized, results of procedures

(d) Methodologies employed, citation for methodologies

The applicant must receive Department approval prior to execution of this program.

~~(4) Where the regulations require a soils analysis to be performed in order to determine cumulative metals loading a complete digestion process is required, and the specific testing method shall be referenced in the report; leachate tests would only be appropriate when testing to determine exchangeable cations uptake of metals by the plant-root system.~~

(4) The Department requires that the laboratories utilized for sludge, soil, and ground water analyses to be certified and may charge an annual fee for certification.

~~(5) Where the regulations require a soils analysis to be performed in order to determine cumulative metals loading, a complete digestion process is required, and the specific testing method shall be referenced in the report; leachate tests would only be appropriate when testing to determine exchangeable cations uptake of metals by the plant-root system.~~

#### Subsection 1002. Other Treatment Methods.

The Department may issue permits for the treatment of sludge by other processes if it can be demonstrated by the applicant that the following conditions will be met:

(a) The treatment process does not contaminate the sludge to an extent that subsequent utilization of the treated sludge presents a public health hazard or danger to the environment.

(b) Health hazards, environmental degradation, or nuisances do not result from the operation of the treatment process.

(c) If the facility is constructed after the date when these regulations are adopted by the Department, a 1,000 foot buffer zone shall be maintained between the sludge processing or storage area and nearest inhabited off-site dwelling. This buffer distance may be reduced if the Department considers that the facility had adequate specific conditions to control odors and nuisances.

#### Subsection 1003. Information Required for Permits.

Applications for permits for the treatment of sludge shall include a description of the treatment method, the source of the sludge, the quantity of sludge involved, and a map showing the location of the treatment facility. After a preliminary review the Department will specify the additional information necessary to evaluate the project and

complete the application. Copies of this information shall be submitted and may include the following:

(a) A site specific topographic map with a minimum scale of 1 inch = 200 feet and a contour interval of not more than 5 feet, showing the areal extent of the site, the property boundaries, the exact acreage of the facility, location of all buffer zones, and surrounding land uses within 2500 feet including residences, streams, roads and wells.

(b) Site specific geologic and hydrogeologic information as required by the Department to ensure that the treatment facility does not constitute a threat to ground or surface waters of the State.

(c) Detailed discussion of the methods to be used for the protection of the ground water, such as leachate control or natural attenuation.

(d) A laboratory analysis of each sludge in conformance with Subsection 402(2) of these regulations. The analysis shall include, as a minimum, percent solids, pH, and the dry weight concentration of total nitrogen, ammonium, nitrate, total phosphorous, total potassium, cadmium, copper, mercury, nickel, lead, and zinc. The Department may require the analysis of other parameters if considered necessary to protect public health or the environment.

(e) A proposed program for monitoring the chemical quality of the ground water and surface waters on the site, including the depth and location of monitoring wells if applicable.

(f) Written permission of the landowner or landowners for the operation to be carried out, and evidence of zoning approval as required by 7 Del. Code 6003(c).

(g) Procedures to be employed to control odors, nuisances, and public access.

(h) Location of the 100-year flood plain, if applicable.

(i) Tax maps and property identification numbers.

(j) Detailed design calculations.

(k) Detailed engineering plans and specifications.

(l) A detailed description of the treatment process.

(m) Plans for storage and ultimate utilization of the treated sludge.

(n) Plan to monitor efficiency of treatment device or process.

(o) Contingency or emergency plans.

(p) Other relevant information requested by the Department.

## SECTION 1100 HANDLING:

Subsection 1101. Distribution. The Department may issue a permit for the distribution of treated sludge, or sludge products if all of the following requirements are met:

(1) For unlimited distribution to the general public:

(a) ~~The sludge or sludge product has been treated by a process to further reduce pathogens (PFRP) as described in these regulations.~~

(b) ~~The treated sludge or sludge product meets guidelines for the limitation of heavy metals and other constituents as set by the Department. The constituent concentrations for sludge or sludge products containing less than 3 percent nitrogen for unlimited distribution to the general public to be used as a fertilizer or soil conditioner may not exceed the following values:~~

| Contaminant | Parts Per Million<br>Concentration<br>(Dry Weight Basis) |
|-------------|--|
| Cadmium     | 12.5   |
| Copper      | 500  |
| Lead        | 500  |
| Mercury     | 5  |
| Nickel      | 100  |
| Zinc        | 1250   |
| PCBs        | 5  |

(c) ~~When distributed, a printed handout (in the case of bulk distribution) or a label (for bagged product) shall accompany the treated sludge or sludge product shall accompany the treated sludge or sludge product. It shall identify the product as containing sludge, and give instructions for its proper use on different plant types, soils and slopes, maximum loading rates (such as number of square feet per bag, ratio of sludge to soil in sludge soil mixture, etc.), any unacceptable uses of the material, proper storage and stockpiling of the material, and shall provide information on essential plant nutrient content. The Department may require that specific restrictions, warnings, or a caution statement be included. For sludge or sludge products for general distribution to the public which contain more than 4 percent iron on a dry weight basis, it shall warn against using the sludge or sludge product on pasture land.~~

(d) ~~A quality control program approved by the Department shall be instituted to assure that all treated sludge and sludge products to be distributed meet the Department's standards regarding the destruction of primary pathogen organisms (PFRP) and the limitations for heavy metals and other contaminants. During the stabilization process, temperature shall be monitored regularly until temperatures recorded in the material (or off-gas from a heat drying process) exceed the level and duration required for adequate pathogen destruction. For aerobic stabilization~~

processes, oxygen levels shall also be monitored frequently to assure that aerobic conditions are maintained. Additional monitoring of the treatment process may be required on a case-by-case basis.

(e) A recordkeeping and reporting system shall be maintained as prescribed by the Department. This system shall contain, as a minimum, provisions for keeping distribution records, results of all tests performed as a part of the quality control program, and procedures for regular reporting of this information to the Department.

(2) For limited distribution:

(a) The Department may issue a permit for the limited distribution of a sludge or sludge product that exceeds the contaminant levels listed in Subsection 1101(1)(b), if the Department determines that the proposed distribution and usage plans do not endanger public health or the environment.

(b) The sludge or sludge product has been treated by a process to further reduce pathogens (PFRP) as defined in these regulations.

(c) Allowable constituent concentrations and loadings will be determined based upon the end uses of the sludge product. Consideration must be given to the populations and environments initially exposed to contaminants that may be present in the product. In addition to end-use of the sludge product, future use of the land to which the product will be applied is important. Therefore, the potential for land use conversion must also be considered.

(d) All sludge or sludge products exceeding 10 mg/kg PCB (dry weight basis) must be immediately incorporated into the soil.

(e) Sludge or sludge products for limited distribution to the general public shall contain 10 percent or greater by weight calcium carbonate equivalent. In certain cases this requirement may be waived at the Department's discretion if the applicant can demonstrate that metal leaching is not a concern, or if the crop optimal pH would be substantially limited by such lime addition, in which case instructions for proper use on different plant types shall be incorporated into the label.

(f) A quality control program approved by the Department shall be instituted to assure that all treated sludge and sludge products to be distributed meet the Department's standards regarding the destruction of primary pathogen organisms (PFRP) and the limitation of heavy metals and other contaminants. During the stabilization process temperature shall be monitored regularly until temperatures recorded in the material (or off-gas from a heat-drying process) exceed the level and duration required

for adequate pathogen destruction. For aerobic stabilization processes oxygen levels shall also be monitored frequently to assure that aerobic conditions are maintained. Additional monitoring of the treatment process may be required on a case-by-case basis.

(g) A recordkeeping and reporting system shall be maintained as prescribed by the Department. This system shall contain, as a minimum, provisions for keeping distribution records, results of all tests performed as a part of the quality control program, and procedures for regular reporting of this information to the Department.

(h) When distributed, a printed handout (in the case of bulk distribution) or a label (for bagged products) shall accompany the treated sludge or sludge product. It shall identify the product as containing sludge, and give instructions for its proper use on different plant types, soils and slopes, maximum loading rates (such as number of square feet per bag, ratio of sludge to soil mixture, etc.), any unacceptable uses of the material, proper storage and stockpiling of the material, provide information on essential plant nutrient content, and address maximum cumulative loading rates if contaminant concentrations are of concern. The Department may require that specific restrictions, warnings, or a caution statement be included.

#### SECTION 1100. GENERATOR, PREPARER, APPLIER, OWNER, AND LEASEHOLDER RESPONSIBILITIES.

##### Subsection 1101. Generator's Responsibility.

(1) Each sludge generator who generates or otherwise produces sludge in Delaware shall maintain the following information for a minimum of five (5) years:

(a) Volume of sludge generated monthly, or a dry weight basis.

(b) The name, address, telephone number and NPDES permit number and the sludge utilization permit number of the person(s) who prepare and apply the sludge, if different from the generator.

(c) The location, by either street address or longitude and latitude of all sludge storage, utilization, disposal, or reclamation sites where the generator's sludge has been placed.

(d) The concentration of pollutants identified in Section 400 of these regulations as required by the Department.

(e) A description of how pathogen and vector reduction requirements are met, including a signed certification statement approved by the Department.

(f) Any additional information required by the Department.

Subsection 1102. Application for a Permit.

Applications for a permit to distribute and market treated sludge or sludge products shall be accompanied by copies of the following information:

(1) Evidence that the treatment process meets the Department's standards for a process to further reduce pathogens (PFRP):

(2) A detailed description of the treatment process, which shall include, at a minimum:

(a) A process flow chart which identifies and explains each phase of the stabilization process.

(b) A description of all major equipment used in the stabilization process.

(c) Location and type of all monitoring and process control equipment.

(d) Copies of process control and monitoring worksheets used to monitor the stabilization process.

(e) An explanation of how the applicant plans to comply with storage, collection, and transportation requirements of these regulations.

(3) Chemical analyses of sludge material:

(a) Each application for a permit shall include three chemical analyses of the sludge or sludge product that is proposed for distribution and marketing. The analyses shall be conducted for the following parameters:

(i) Moisture content, percent total nitrogen (moist and dried), ammonium  $\text{NH}_4\text{-N}$  and nitrate  $\text{NO}_3\text{-N}$  content (moist and dried), pH, percent volatile solids, PCB's.

(ii) The following, as reported on a dry weight basis: cyanide, sodium, phosphorus, potassium, iron, cadmium, zinc, copper, nickel, lead, chromium, and mercury.

(iii) Such other compounds or constituents which may be required by the Department, including, but not limited to BOD, COD, TOC, C:N ratio, arsenic, boron, molybdenum, selenium, TOX, and specific enteric pathogens.

The analyses shall be conducted on composite samples of the product to be applied, and shall be reported in a tabular form that lists the range of the three samples. Each of the composite samples shall be taken at intervals of more than 30 days unless otherwise approved by the Department in writing. Additional samples may be required if significant variability in product quality is noted. Sampling procedures shall be consistent with the applicable Department land treatment guidelines and Section 1200.

(b) The results from an Extraction Procedure Toxicity Test.

(c) The results from a Priority Pollutant Scan.<sup>1</sup>

(4) An estimate of annual volume to be distributed.

(5) A copy of the proposed label or printed handout.

A current listing of the 126 Priority Pollutants can be found by referencing 40 CFR Part 423, Appendix A, 1987.

(6) The quality control monitoring plan.

(7) A description of the recordkeeping and reporting system, including proposed format.

(8) A description of the distribution and marketing system to include an identification of the end users and the final use of the treated sludge or sludge product.

(9) Evidence that the proposed distribution and final use of the treated sludge or sludge product does not result in public health hazards, environmental degradation, or health nuisances.

(10) Information confirming that all requirements of the Delaware Commercial Fertilizers and Soil Conditioner Law regarding registration of commercial fertilizers and soil conditions have been met.

(11) Information concerning storage requirements, storage volume, holding time, runoff/runoff control, and site access control.

(12) Other relevant information requested by the Department.

#### Subsection 1102. Preparer's Responsibility.

(1) Each sludge preparer who prepares or otherwise treats sludge for final utilization or disposal in Delaware shall submit to the Department the following information, at a frequency identified in Section 400 of these Regulations:

(a) The concentration of total nitrogen of the prepared sludge.

(b) The concentration of pollutants identified in Section 700 of these Regulations.

(c) Other constituent concentrations identified in the sludge utilization or disposal permit.

(d) A description of how pathogen and vector reduction requirements are met, including a signed certification statement approved by the Department.

(2) The information required in 1 above, shall also be provided to the sludge applier, if the applier is different from the sludge preparers, and shall be maintained for a minimum of five (5) years.

~~Subsection 1103. Other Methods.~~ Other methods of handling sewage sludge not specifically addressed in these regulations may be permitted if the applicant can provide sufficient evidence that the proposed method of handling does not present public health hazards, dangers to the environment, or health nuisances.

#### Subsection 1103. Applier's Responsibility.

(1) Each sludge applier who land applies or disposes of sludge in the state shall submit to the Department the following information at a frequency identified in Section 700 of these Regulations. This part does not apply to sludge appliers who transport sludge to a sanitary landfill in accordance with Subsection 706 of these Regulations or to sludge appliers who apply sludge or sludge products in accordance with a valid Distribution and Marketing permit issued by the Department. Required information includes:

(a) The location, either by street address and longitude and latitude of all sludge utilization, disposal or reclamation sites where the applier has placed sludge.

(b) The total volume of sludge (in dry metric tons per hectare) applied to each site annually; the number of hectares the sludge was applied to; and the total site acreage.

(c) The cumulative pollutant loading rate (CPLR) of each pollutant listed in Table 402-4 applied to the site to date.

(d) The applier shall provide a description of how the management requirements in Sections 702, 703, and 404(7) were met and shall certify that hte management requirements were met.

(2) For all Class B sludges that are land applied, the appliers shall provide a description of how all site restrictions were met and shall certify that all site requirements identified in Section 600 and 700 of these Regulations have been met.

(3) When vector attraction reduction requirements are achieved using either method (i) or (j) as described in Section 604 (2) of these Regulations, the applier shall maintain records documenting the methods employed to comply with these requirements. The applier shall also certify that the above vector attraction reduction requirements were met.

(4) The applier shall provide to the landowner or lease holder notice and information necessary to comply with these regulations and the permit. The information shall include:

(a) The date(s) sludge was applied to the site.

(b) The areas on which sludge was applied, including acreage.

(c) The loading rate of sludge in dry tons per acre.

(d) The total amount of nitrogen available for crop uptake from the sludge application in pounds per acre.

(e) A copy of a recent laboratory analyses of the sludge.

(f) Any other information required by the Department.

Subsection 1104. Landowner or Leaseholder

Responsibilities.

(1) Prior to sludge application the landowner or leaseholder shall provide the sludge applier the following information:

(a) Identification of crops to be grown.

(b) Approximate dates for seeding or planting of crops.

(c) A statement agreeing to comply with site and crop restrictions when Class B sludges are applied to the field(s).

(d) Any other information required by the Department.

Subsection ~~1302~~ 1105. Fee Schedule.

(1) The Department may establish a schedule of annual and/or one-time fees with respect to sludge treatment, storage, transportation, land application/treatment, and distribution. This fee schedule may be revised from time-to-time after notice and opportunity for hearing.

Subsection ~~1303~~. Fee Payment.

(1) One time fees shall be submitted to the Department at the time of application. Fees shall be submitted to the Department upon receipt of notice from the Department, or in accordance with the following fee payment schedule:

| <u>Fee Amount</u>            | <u>Payment Schedule</u>                    |
|------------------------------|--|
| Less than \$1,000            | Upon receipt of notice from the Department |
| Between \$1,000 and \$10,000 | Quarterly payments                         |
| Over \$10,000                | Monthly payments                           |

(2) The Department shall impose late charges at the rate of 1 percent per month, compounded, for any fee not received within 30 days of the due date.

(3) Failure to pay fees shall constitute grounds for denial of subsequent applications for Permits, and revocation of previously issued permits involving sludge from the applicant.

~~SECTION 1400. SEVERABILITY. If any part of these regulations of practice or the application of any part thereof, is held invalid or unconstitutional, the application of such part to other persons or circumstances and the remainder of these rules of practice shall not be affected thereby and shall be deemed valid and effective.~~

~~SECTION 1500. WATER TREATMENT SLUDGES. Differences in requirements noted in this Section are for~~

solids that are deposited from surface or ground waters treated in a water treatment facility. This Section does not apply to facilities or practices that are engaged in groundwater or surface water remediation projects, Superfund or RCRA project.

Subsection 1051. Drying Operations.

Dewatering operations must be specifically designed and constructed to safely dewater sludges without resulting in public health or environmental problems, or creation of nuisance conditions. The Department may approve the construction and operation of dewatering beds or unlined lagoons without requiring further treatment of the leachate if the following conditions are met:

(1) For liquid sludge: If the unit is designed and constructed in accordance with the specifications as stated in Subsection 902 excluding numbers 3, and 5.

(2) For sludge cake and dried sludge: If the facility is designed and constructed in accordance with the specifications as stated in Subsection 902 excluding numbers 3, 5, and 6, and in accordance with the specifications stated in Delaware Erosion and Sediment Control Handbook, 1989 when constructing above ground storage facilities.

(3) A groundwater monitoring program is conducted in accordance with a plan approved by the Department. At a minimum, three wells, one upgradient and two downgradient of the unit shall be installed. The Department may waive this provision if it can be proven to the Department's satisfaction that the unit will not present an unreasonable risk to groundwater quality.

(4) If the facility is constructed after the date when these regulations are adopted by the Department, a 100 foot buffer zone shall be maintained between the sludge processing or storage area, or both and the nearest inhabited off-site dwelling.

(5) The information required in Subsection 1503.1 is submitted.

Subsection 1502. Waivers on Requirements.

The following requirement will be waived for projects involving water treatment sludges:

(1) Subsection 704.3.A. will be waived.

Subsection 1503. Additional Requirements.

(1) The following information must be included as part of the permit application for the desired sludge utilization method if a dewatering bed or unlined lagoon is used:

(a) The information required in Subsection 904, with the omission of numbers 10, 14, 15, 16, and 17. Number 8 may be omitted for dewatering beds.

(b) Chromium, aluminum, and iron are to be added

to the list of parameters in 904.2 that the sludge must be analyzed for.

(e) An emergency/contingency plan to include, but not limited to, spill cleanup and containment failure.

Part III. The Utilization of Sludges and Sludge Products

B. Regulations

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**\* PLEASE NOTE THE ABOVE PAGE NUMBERS REFER TO THE ORIGINAL DOCUMENT AND NOT TO THE REGISTER.**

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Symbol Key

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text added at the time of the proposed action. Language which is ~~stricken~~ through indicates text being deleted. [**Bracketed Bold language**] indicates text added at the time the final order was issued. [~~Bracketed stricken through~~] indicates language deleted at the time the final order was issued.

Final Regulations

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the Register of Regulations. At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the Register of Regulations, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

## DELAWARE SOLID WASTE AUTHORITY

Statutory Authority: 7 Delaware Code,  
Chapter 64 (7 Del.C. Chp. 64)

On March 25, 1999 the Board of Directors of the Delaware Solid Waste Authority ("DSWA") adopted revisions to its regulations and Statewide Solid Waste Management Plan as well as a new Differential Disposal Fee Program.

### Statewide Solid Waste Management Plan (adopted May, 1994)

#### Contents

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**\*PLEASE NOTE THAT THE ABOVE PAGE NUMBERS REFER TO THE ORIGINAL DOCUMENT AND NOT TO THE REGISTER.**

#### I. PURPOSE AND AUTHORIZATION

These Regulations\* are adopted pursuant to the Act to achieve the goals set forth therein.

#### II. DEFINITIONS

"Act" means the Delaware Solid Waste Authority Act, 7 Del. C. Ch. 64.

"CEO" means Chief Executive Officer and Manager of DSWA.

"Chairman" means the Director designated by the Governor as chairman of DSWA in accordance with 7 Del. C. Section 6403(a).

"Department" means the Department of Natural Resources and Environmental Control of the State of Delaware.

"Directors" means the directors of DSWA holding office in accordance with 7 Del. C. Section 6403.

"Dry Waste" means wastes including, but not limited to, plastics, rubber, lumber, trees, stumps, vegetative matter, asphalt pavement, asphaltic products incidental to construction/demolition debris, or other materials which have reduced potential for environmental degradation and leachate production.

"DSWA" means the Delaware Solid Waste Authority, an instrumentality of the State of Delaware, existing

pursuant to the Act.

"Hazardous Waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, or chemical characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating irreversible illness, or poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed. Without limitation, included within this definition are those hazardous wastes listed in Sections 261.31, 261.32 and 261.33 of the Delaware Regulations Governing Hazardous Waste and those solid wastes which otherwise exhibit the characteristics of a hazardous waste as defined in Part 261 of the Delaware Regulations Governing Hazardous Waste.

"Industrial Process Solid Waste" means solid waste produced by or resulting from industrial applications, processes or operations and includes, by way of example and not by way of limitation, sludges of chemical processes, waste treatment plants, water supply treatment plants, and air pollution control facilities and incinerator residues, but does not include the solid waste generated at an industrial facility which is comparable to municipal solid waste, such as cafeteria waste, cardboard, paper and pallets, crates or other containers constructed of and containing non-hazardous combustible material.

\* The Department also has promulgated regulations pertaining to solid waste disposal.

"Junkyard" means an establishment or place of business which is maintained, operated or used for storing, keeping, buying or selling junk or wrecked, scrapped, ruined or dismantled motor vehicles or motor vehicle parts.

"Licensee" means a person holding a license issued by DSWA pursuant to Article III of these Regulations.

"Municipality" means a county, city, town or other public body of the State of Delaware.

"Person" means any individual, partnership, corporation, association, institution, cooperative enterprise, municipality, commission, political subdivision, or other duly established legal entity.

"Solid Waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or water pollution control facility and other discarded material, including solid, liquid, semi-solid or contained gaseous material, resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended, or source, special nuclear, or by-product materials defined by the Atomic Energy Act of 1954, as amended, or materials separated on-site by the generator thereof for further use, service or value.

"Solid Waste Facility" means any landfill, recycling project, including waste to energy projects, collection station, transfer station, or other solid waste processing or disposal facility or project operated by, on behalf of, or under contract with DSWA.

"Toxic Substance" means any chemical substance or mixture that may present an unreasonable risk of injury to health or the environment.

"Transfer Station" means any facility where quantities of solid waste delivered by vehicle are consolidated or aggregated for subsequent transfer by vehicle for processing, recycling or disposal.

### III. COLLECTION AND LICENSING

3.01 No person shall collect, transport, and/or deliver solid waste in the State of Delaware without first having obtained a license from DSWA, provided, however, that:

a. persons transporting and delivering solid waste that they created on their premises resulting from their activities shall not be required to obtain a license therefore; and

b. persons collecting, transporting and/or delivering solid waste in the course of their employment by a person holding a license from DSWA shall not be required to obtain a license therefore; and

c. a license shall not be required for the collection, transportation, or delivery exclusively of dry waste, leaves, street and storm sewer cleaning materials, agricultural wastes or those materials identified in paragraph 4.02 (a) - (e) of these Regulations.

~~3.02 Each Licensee shall deliver solid waste collected in Delaware to a Solid Waste Facility. DSWA, based upon the CEO's determination of threat to public health or welfare or other emergency, may designate a specific Solid Waste Facility.~~

3.02 With respect to solid waste delivered to Solid Waste Facilities, the CEO, based upon a determination of threat to public health or welfare or other emergency, may designate a specific Solid Waste Facility for use.

3.03

a. Each Licensee shall clearly display on both sides of the vehicle:

i. the license stickers provided by DSWA which are the property of DSWA and subject to cancellation, suspension and/or revocation. The license stickers shall be legible at all times and shall be placed in an area of high visibility to allow immediate identification by DSWA Weighmasters and Compliance Officers. License stickers shall be not be placed on fuel or hydraulic tanks or reservoirs, or areas where the operation of mechanical parts would impair the visibility of stickers;

ii. the Licensee's business name with letters at least three (3) inches high and of a color that contrasts with the color of the vehicle. No name other than the Licensee's business name shall be displayed. A regularly used business logo may also be displayed.

b. Licensees shall maintain business offices and phone numbers as follows:

i. Licensees who collect on a yearly average 100 tons per month or more:

(a) each Licensee shall maintain a manned business office location or locations and designate a representative in responsible charge thereof;

(b) each Licensee shall provide his business office street address in addition to a Post Office Box;

(c) telephone coverage with a Delaware telephone number listed in the appropriate Delaware Telephone Directory in the business name of the Licensee shall be maintained by a responsible and authorized person at the main office during normal business hours. Licensees with main offices located outside of the State of Delaware may utilize a call forwarding service so that a Delaware telephone number may be dialed to reach an out-of-state office. An answering machine shall not satisfy this; and

(d) notification regarding any change of business location or telephone number shall be provided to DSWA in writing at least fifteen (15) days prior to such change.

ii. Licensees who collect on a yearly average less than 100 tons per month:

(a) each Licensee shall provide a street address in addition to a Post Office Box for the business office or dwelling that is able to receive correspondence. A Post Office Box shall not satisfy this requirement;

(b) telephone coverage with a Delaware telephone number listed in the appropriate Delaware Telephone Directory in the business name of the Licensee shall be maintained by the Licensee during normal business hours. Licensees with main offices located outside of the State of Delaware may utilize a call forwarding service so that a Delaware telephone number may be dialed to reach an out-of-state office. An answering service may be utilized. An answering machine shall not satisfy this requirement; and

(c) notification regarding any change of business location or telephone number shall be provided to DSWA in writing at least fifteen (15) days prior to such change.

### 3.04

a. Each Licensee shall maintain insurance at the following minimum amounts:

i. Automobile liability: \$350,000 combined bodily injury and property damage per occurrence;

ii. General liability: bodily injury \$300,000 per occurrence; property damage: \$100,000 per occurrence; and

iii. Workman's Compensation as required by law.

b. Each Licensee shall provide to DSWA new certification of the coverages specified in subsection 3.04(a) including a certification within ten (10) days of renewal. Each such certification of insurance shall provide that DSWA receive at least thirty (30) days advance notice of any canceled, discontinued, or diminished coverage.

3.05 Each Licensee shall maintain collection vehicles to comply with the following minimum requirements:

a. Each collection vehicle body shall be maintained to prevent fluids from discharging onto the surface of the ground.

b. Each collection vehicle body shall be capable of being readily emptied.

c. Each collection vehicle shall be kept in a as much of a sanitary condition as to control the presence of vectors.

d. Containers, boxes, and other devices excluding open top trailers referred to as roll-offs, used by Licensees for collection of solid waste in excess of thirty (30) gallon capacity shall be enclosed to reduce fluid leakage or collection of water.

e. Each collection vehicle shall be equipped so that it can be readily towed, and maintained in good operational condition for safe and stable operation and/or navigation in or about a Solid Waste Facility.

f. Each collection vehicle used or proposed for use by an applicant or Licensee and the contents of any collection vehicle shall be subject at all times to inspection by DSWA.

g. All roll-off containers used for collecting, transporting and delivering of solid waste generated within the State of Delaware shall display stickers issued by DSWA near the bottom and front of both sides of each roll-off. Solid waste described in Section 4.03 shall be exempt from this requirement.

3.06 Each Licensee shall comply with the following requirements while collecting, transporting and/or delivering solid waste.

~~a. Solid waste shall not be processed, scavenged, modified, or altered except that it may be compacted and/or unloaded and reloaded at a transfer station not in violation of Article IX of these Regulations.~~

a. Solid waste shall not be processed, scavenged, modified, or altered unless in compliance with applicable laws and regulations.

b. Solid waste shall be suitably enclosed or covered to prevent littering or spillage of solid waste or fluids.

~~e. Solid waste shall not be stored in a collection vehicle for more than twenty-four (24) hours, except when the Solid Waste Facility is closed for the entire day when the twenty-four period expires; in that event, the collection vehicle shall discharge the solid waste at a Solid Waste Facility on the next day that a Solid Waste Facility is open.~~

c. Solid waste shall not be stored in a collection vehicle for more than twenty-four (24) hours unless the solid waste is being delivered to a Solid Waste Facility and the facility is closed for the entire day when the twenty four hour period expires, in which case the collection vehicle may discharge the solid waste at the facility on the next day that the facility is open.

d. Any spillage of solid waste shall be immediately cleaned up and removed.

e. No undue disturbance shall be caused in residential areas as a result of collection operations.

3.07 All collection vehicles shall be owned in the name of the Licensee or leased in the name of the Licensee. Upon submission of an application for a license each applicant shall provide a copy of a valid motor vehicle registration card for each collection vehicle. If the collection vehicle is not owned by the applicant, a copy of a written motor vehicle lease agreement shall also be submitted with the application.

3.08 Each Licensee shall provide and continuously maintain backup capability to allow for continued collection, transportation and/or delivery of solid waste in the event of equipment breakdown. As a minimum each Licensee, except for municipalities with a written agreement with another municipality for such backup, shall own and/or lease, in the name of the licensee, at least two fully and continuously operational collection vehicles, except for down time for routine maintenance.

3.09 Only enclosed compactor type vehicles or "roll-offs" with a cover sufficient to prevent any spillage of, loss of, or littering of solid waste shall be used by Licensees for collection, transportation, or delivery of solid waste, except for vehicles utilized only to collect, transport or deliver the solid wastes referenced in Section 4.02 (a-e) and Section 4.03, infra, or oversized bulky waste, such as couches and refrigerators. Such vehicles used for oversized bulky waste shall not satisfy part or all of the Section 3.08 requirement that each Licensee own and/or lease at least two fully and continuously operational vehicles. An exception to the requirements of the first sentence of this section may be authorized by the CEO or his designee in circumstances where it is physically impossible to provide solid waste collection services with such vehicles.

3.10

a. With the exception of any municipality, each applicant for a license and each Licensee shall provide to DSWA and maintain a bond under which the Licensee shall be jointly and severally bound with a corporate surety qualified to act in the Courts of Delaware to DSWA for amounts due to DSWA for fees or charges for services.

b. In lieu of corporate surety, the applicant or Licensee may provide security for its bond by depositing with DSWA, one of the following in an amount at least equal to the amount of the bond:

i. United States Treasury bonds, United States Treasury notes, United States Treasury certificates of indebtedness, or United States Treasury bills; or

ii. bonds or notes of the State of Delaware; or

iii. bonds of any political subdivision of the State of Delaware; or

iv. certificates of deposit or irrevocable letters of credit from any state or national bank located within the United States; or

v. United States currency, or check for certified funds from any state or national bank located within the United States.

c. The amount of the bond specified in paragraph 3.10 (a) shall be based upon the total solid waste tonnage charged by the Licensee at Solid Waste Facilities during for the month of November immediately preceding the license year for which the license is issued in accordance with the following schedule:

| "TONNAGE CHARGED FOR PRIOR NOVEMBER"                       | AMOUNT OF BOND       |
|--|----------------------|
| Less than or equal to 750 tons                             | (minimum)<br>\$5,000 |
| Greater than 750 tons but less than or equal to 1,500 tons | \$25,000             |
| Greater than 1,500 tons                                    | \$50,000             |

If the Licensee has expanded or acquired its business since the preceding November, then the total tonnage for November and Bond amount will be adjusted to account for such increase. By reference to the accounts, business, or assets acquired, an estimate will be made of what the charges in November would have been if the Licensee had been operating the newly acquired accounts, business, or assets at that time.

3.11 Any person desiring to collect, transport, and/or deliver solid waste in the State of Delaware shall submit a completed application for license to DSWA on forms provided by DSWA substantially in the form set forth in Appendix "A" of these Regulations. DSWA shall approve or deny license applications within thirty (30) days of receipt of a completed application.

3.12 DSWA may require information to supplement that requested in Appendix "A" in reviewing license applications.

3.13 The license period shall be July 1 to June 30 annually. Applications for license renewal shall be submitted to DSWA at least thirty (30) days prior to the expiration date.

3.14 Before any additional collection vehicle or substitute collection vehicle is utilized for the collection, transportation, and/or delivery of solid waste, the Licensee shall submit to DSWA the following:

- a. The name, address and telephone number of the owner of the vehicle.
- b. The state motor vehicle registration number.
- c. A description of chassis by year and manufacturer.
- d. A description of the body by year and manufacturer.
- e. The legal weight limit of the vehicle.
- f. The volume of the body of the vehicle in cubic yards.
- g. Evidence of the insurance coverage required by this Article.

3.15 Each license shall contain the following:

- a. Name and address of the Licensee.
- b. A listing of all collection vehicles under the license.
- c. The location or locations for delivery of solid waste for each collection vehicle.
- d. Special license conditions regarding collection, transportation, and/or delivery of solid waste, as specified by DSWA.

3.16 Each license and/or collection vehicle may be transferred subject to prior approval of DSWA. Except for a municipality with a written agreement with another municipality for backup capacity, no person shall be entitled to collect, transport and/or deliver solid waste under another person's license.

3.17 Notwithstanding anything to the contrary contained in these Regulations, a Licensee may operate a replacement vehicle on a temporary basis for a period of fifteen (15) days; provided further, that the licensee shall provide DSWA an original signed letter on company letterhead providing the information listed in Section 3.14 of these Regulations. An original letter must be submitted for each day of operation until DSWA license stickers are properly displayed on the vehicle or the vehicle is removed from temporary service. Letters must be taken to the weighstation of the Solid Waste Facility.

3.18 No license shall be issued to any person who:

- a. has an account with DSWA that is past due in accordance with DSWA policies or
- b. is obligated to file a report in accordance with Section 8.02 of these Regulations and has not done so for the

immediately preceding calendar year.

3.19 Any person who first collects and transports solid waste within the State of Delaware, without having first obtained a license under this Article, shall not be issued a license under this Article, until the expiration of one hundred twenty (120) days after the last day on which such collection and transportation without a license occurred, as determined by the CEO, or his designee.

3.20 Any Licensee who does not maintain his principal place of business in Delaware shall designate an agent, by name and street address (box number not acceptable), for service of process within Delaware. The agent shall be either an individual resident in Delaware or a corporation authorized under Title 8 of the Delaware Code to transact business in Delaware.

3.21 Before a license application is approved or denied, DSWA shall determine whether the applicant is able and reasonably certain to comply with these Regulations. Such determination may take into account any relevant factors including, but not limited to, the prior conduct of the applicant or any person, as defined herein, who is employed by or is otherwise associated with the applicant and may significantly affect the applicant's performance as it is related to the licensed activities. If the application is denied, the determination shall be reduced to writing and include the rationale for denial. Any person denied a license shall be entitled to request a hearing on such determination before the Directors of DSWA in accordance with paragraph 11.01 (b) hereof.

3.22 No license shall be issued to any person who:

- a. holds or has held a license from DSWA which has been revoked;
- b. holds or has held a license from DSWA which has been suspended, for such period as the license is suspended.
- c. holds or has held an interest in any Licensee whose license from DSWA has been revoked;
- d. holds or has held an interest in any Licensee whose license from DSWA has been suspended, for such period as the license is suspended.
- e. owns, in whole or in part, solid waste operating assets, including vehicles and routes, which were acquired from a Licensee whose license from DSWA was revoked or suspended and who acquired such assets from such Licensee for less than fair market value. Applicants for a license may be required to produce records and other information to demonstrate that they comply with this paragraph before a license will be issued.

3.23 A Licensee shall give written notice to DSWA at least seven (7) days in advance of any of the following:

- a. sale or conveyance of a significant portion of its

assets;

b. sale or conveyance of a significant portion of the equity interest (e.g. stock) held in it;

c. purchase or other acquisition of a significant portion of the assets of another Licensee;

d. purchase or other acquisition of a significant portion of the equity interest in another Licensee. For purposes of this paragraph, a significant portion shall mean one-half. Fragmentation of a transfer into smaller portions shall not be used to avoid the requirements of this paragraph.

**IV. USE OF SOLID WASTE FACILITIES**

**4.01**

a. ~~Except as otherwise provided in this Article:~~

i. ~~All solid waste generated within the State of Delaware shall be delivered to and disposed of at a Solid Waste Facility;~~

ii. ~~The owners and occupants of all lands, buildings, and premises located within the State of Delaware, and all those persons acting for them or under contract with them, shall use only Solid Waste Facilities for the disposal of solid waste generated within the State of Delaware.~~

**4.01**

a.

i. All solid waste generated within the State of Delaware shall be delivered to and disposed of at a Solid Waste Facility or some other duly licensed or permitted facility.

ii. The owners and occupants of all lands, buildings, and premises located within the State of Delaware, and all of those acting for them or under contract with them, shall use only Solid Waste Facilities or other duly licensed or permitted facilities for the disposal of solid waste generated within the State of Delaware.

b. Subject to the provisions of Section 3.02 and 3.18 of these Regulations, solid waste generated within the State of Delaware shall be delivered to a Solid Waste Facility or other duly licensed or permitted facility.

c. Persons delivering solid waste to a Solid Waste Facility shall pay to DSWA the applicable fees and user charges.

4.02 The following solid wastes shall not be delivered to a Solid Waste Facility:

- a. Hazardous wastes
- b. Explosives
- c. Toxic substances
- d. Pathological and infectious wastes
- e. Radioactive wastes
- f. Solid wastes, as determined by the CEO or his designee, which will, because of their quantity, physical

properties, or chemical composition, have an adverse effect on the Solid Waste Facility, or the operation of the Solid Waste Facility, or if an effective means of risk and cost allocation cannot be achieved.

~~g. Solid waste generated outside the State of Delaware.~~

4.03 The following solid waste may be delivered to a Solid Waste Facility for disposal, but need not be, upon payment of the appropriate fee or user charge, provided that delivery of such solid waste is not otherwise proscribed by Section 4.02:

- a. Agricultural waste generated on a farm.
- b. ~~Dirt, sand, crushed rock, concrete, asphalt, inert demolition and construction debris, trees, bushes, branches, leaves, and material collected in street and storm sewer cleaning.~~ Dry waste.
- c. Tires.
- d. Non-hazardous waste resulting from emergency clean-up actions of the Department.
- e. Industrial process solid waste exempted by Section 5.03 (b).

4.04 In the event that an invoice generated from the charging of fees or user charges at a Solid Waste Facility is not paid in accordance with DSWA credit policies the license may be revoked and/or the right to use Solid Waste Disposal Facilities may be denied to the user. Before the license revocation and/or denial of use, the user shall have a hearing before the Directors of DSWA, and the user shall be given at least ten (10) days notice of the hearing. Otherwise, the procedure for the hearing shall be as set forth in paragraph ~~H~~ 10.01 (b) (ii)-(v) of these Regulations.

**V. INDUSTRIAL PROCESS SOLID WASTE**

**5.01**

a. Any person causing or allowing industrial process solid waste to be delivered to any Solid Waste Facility for disposal shall obtain the approval of DSWA prior to commencement of such disposal; provided however, that where more than one person is involved in the generation and delivery of a particular industrial process solid waste, approval of DSWA obtained by one person shall be sufficient.

b. In the event that there are any risks or additional costs involved in accepting any industrial process solid wastes, the CEO may impose an industrial process solid waste disposal surcharge to compensate DSWA for such risks and additional costs, including administrative expenses and overhead. The following factors shall be considered in determining the amount of such industrial process solid waste surcharge:

- i. Quantity of waste to be disposed of;
- ii. Degree of risk associated with such disposal;

iii. Additional handling, processing and disposal costs;

iv. Additional administrative expenses and overhead;

v. Additional environmental protection controls including monitoring.

c. The industrial process solid waste surcharge shall be set by the CEO, without notice and public hearing thereon, and may be done on a case by case basis.

5.02 Any person causing or allowing industrial process solid waste to be delivered to a Solid Waste Facility operated by or on behalf of DSWA shall be deemed to have agreed to indemnify and hold harmless DSWA from any liability arising from disposal of such industrial process solid waste and to have agreed to reimburse DSWA for any costs reasonably incurred to protect against or reduce any risk resulting therefrom; provided, however, such person, if such person has not caused or allowed the delivery of a hazardous substance within the meaning of the Comprehensive Environmental Response Compensation Liability Act (CERCLA), as amended, 42 USC Section 9601, et.seq., shall not be liable under this subsection to DSWA for harm or damage caused by the negligence of DSWA.

5.03 It shall be the responsibility of each generator of industrial process solid waste, in addition to the person collecting, transporting and delivering it, to obtain the approval of DSWA for disposal of industrial process solid waste at the Solid Waste Facility and to assure that such waste is delivered to the Solid Waste Facility of DSWA for disposal. Such solid waste shall be exempted from the requirement of disposal in a Solid Waste Facility if:

a. DSWA refuses to approve the disposal of such waste at a Solid Waste Facility; or

b. the generator of such waste determines or agrees to have such waste disposed of at another properly licensed or permitted facility;

c. the solid waste is described in Section 4.02 of Article IV.

5.04 Any person aggrieved by a determination of the CEO or his designee, under this Article or subsection 4.02(f) of Article IV, may seek review thereof by the Directors of DSWA in accordance with Section 6427 (f) of the Act, and Section ~~4~~ 10.01 of these Regulations.

## VI. OTHER SOLID WASTE PROJECTS

6.01 No person shall finance, acquire, license, construct, maintain, operate, or use a solid waste disposal, processing, or recycling project in the State of Delaware that is neither owned nor operated by, on behalf of, or at the request of DSWA.

6.02 No person shall cause or assist in the financing, acquiring, licensing, constructing, maintaining, or operating of a solid waste disposal, processing, or recycling facility in the State of Delaware, that is neither owned nor operated by, on behalf of, or at the request of DSWA.

6.03 This Article VI shall not apply to:

a. Projects dedicated exclusively to the disposal of dry waste, hazardous waste, agricultural waste, explosives, toxic substances, radioactive waste, or tires;

b. Projects used exclusively as transfer stations;

c. Recycle centers for source separated materials, such as aluminum cans;

d. Junkyards;

e. Projects dedicated exclusively to the disposal of industrial process solid waste that are lawfully permitted for the disposal of such industrial solid waste.

f. Projects dedicated exclusively to the disposal of solid waste generated outside the State of Delaware.

## VII. OPERATING IN A SOLID WASTE FACILITY

7.01 All vehicles entering a Solid Waste Facility to dispose of solid waste shall proceed to the appropriate scale. Each vehicle shall come to a full stop before driving onto the scale, for weighing in or for weighing out. Quick stopping or starting on the scales will not be permitted. All personnel must remain in the vehicle unless directed by the Weighmaster to come to the scale house window. After weighing, the vehicle must not leave the scales until authorized to do so by the Weighmaster and must proceed to the area designated for disposal of the quantity and type of waste that is carried in the vehicle.

7.02 After weighing and at the direction of the Weighmaster, each vehicle shall proceed to the area designated. Spotters at the landfill face or on the tipping floor shall direct the vehicles to a dumping location. At small load facilities, waste shall be disposed only in the containers that have been provided. The contents of each vehicle shall be discharged as quickly as possible and the vehicle shall leave as directed by the operating contractor. Clean-up is allowed only at designated locations. No roll-off boxes will be dropped anywhere in a Solid Waste Facility without the express approval from a DSWA representative.

7.03 Each vehicle operator shall exercise caution, due care, and safe procedures in all operations at the Solid Waste Facility. The speed limit on the facility roads is 25 miles per hour except where a lower speed limit is indicated. Vehicle operators shall follow directions from the DSWA representative or the operating contractor in all cases of emergency.

7.04 No hand sorting, picking over, or scavenging of solid waste will be permitted at any time.

7.05 All vehicle operators and other personnel proceed onto the landfill at their own risk. DSWA shall not be liable for acts or omissions of its contractors, persons using a Solid Waste Facility, or other third persons in or about a Solid Waste Facility.

7.06 Persons under the age of 18 are not allowed to enter any Solid Waste Facility in waste collection and disposal vehicles.

7.07 No loitering will be permitted in any Solid Waste Facility.

7.08 DSWA reserves the right to redirect vehicles to alternate locations within the Solid Waste Facility, if for any reason in the opinion of DSWA's representative, the original location cannot handle the load or type of material.

7.09 There shall be no smoking in any Solid Waste Facility except in areas where smoking is expressly permitted.

7.10 The Directors of DSWA from time to time may adopt and post other rules for Solid Waste Disposal Facilities. It is the responsibility of Licensees and other persons using Solid Waste Disposal Facilities to familiarize themselves with and to obey such rules.

7.11 Any vehicle that is immobile and obstructing facility operations shall be moved to a non-conflicting area by DSWA representatives after notifying the Licensee's driver. The Licensee's driver will be given reasonable time to contact his office either through radio or telephone. If the blocking vehicle poses a safety or fire hazard, it will be removed immediately after giving notice to the driver. Licensee shall also give written instructions to drivers on proper procedures for towing.

7.12 To prevent material from falling off vehicles and to minimize litter, all open vehicles, including but not limited to pick-up trucks, entering a Solid Waste Facility to dispose solid waste shall be sufficiently secured through the use of tarpaulins or ropes or netting or enclosures sufficient to prevent the material from falling off the vehicles.

7.13

a. DSWA shall have the right to require unloading of the contents of the vehicle hauling solid waste to any solid waste facility for the purpose of inspection.

b. If any hazardous wastes, explosives, toxic substance, pathological and infectious wastes, radioactive wastes, ~~or solid wastes generated outside the State of~~

~~Delaware~~ are found, then the person delivering such waste to a Solid Waste Facility shall be subject to the sanctions that may be imposed under Section 11.02 for violation of Section 4.02 and sanctions for violation of other applicable laws and regulations and that person shall be notified and given an opportunity to remove properly all of the waste emptied from the solid waste collection vehicle at his expense. If that is not accomplished within four (4) hours of such notice, which shall be either in person or by telephone, or, if the person cannot be reached immediately, either in person or by telephone, DSWA may proceed to arrange for removal and proper disposal of the entire load and the person bringing such material to the Solid Waste Facility shall be liable to DSWA for all costs incurred by DSWA in arranging for proper disposal, including, without limitation, DSWA's out-of-pocket expenses, contractor's fees, disposal costs, overhead supervisory costs, legal fees, testing costs, and transportation costs.

#### VIII. RECYCLING

8.01 The following definitions shall apply to this subarticle:

"Recycling Center" means a facility, established pursuant to 7 Del. C. S6450 et seq., to receive recyclable materials. The Recycling Center includes the recycling containers marked for the specific recyclable materials which are to be deposited therein and the area immediately surrounding them necessary for the purposes of such recycling centers. Recycling Centers shall be known as 'RECYCLE DELAWARE' Centers.

"Recyclable Materials" mean those materials which have been source-separated by the generator thereof for recycling. Source separated materials must remain separate throughout the journey and are not to be re-combined for transport.

"Recycling" means the process by which solid waste is transformed or converted into usable material(s) or product(s).

"Recycler" means a person in the business of collecting, transporting, and delivering recyclable materials.

8.02 All persons operating facilities within Delaware for the purpose of recycling solid waste or recyclable materials other than 'RECYCLE DELAWARE' Recycling Centers shall file annually with DSWA, on forms prescribed by DSWA, a report on the nature of the recycling activities conducted, the quantity and type of materials recycled, and the disposition of the materials recycled. Such reports will be due on April 30 of each year and shall be for the immediately preceding calendar year.

8.03 At a Recycling Center, no person shall:

a. dispose of solid waste or litter;

- b. leave materials outside of recycling containers;
- c. deposit into a recycling container any material other than the specific recyclable material for which the recycling container is marked to receive;
- d. damage, deface, or abuse a recycling container;
- e. block or obstruct vehicles using or serving the Recycling Center;
- f. loiter;
- g. scavenge any Recyclable Material; or
- h. deposit Recyclable Material that has been collected from or by a Recycler.

8.04 Each container used for the collection of Recyclable Material must be clearly marked to prevent normal trash from being placed into the container, i.e., "RECYCLABLE MATERIAL ONLY" - "NO TRASH".

#### IX. TRANSFER STATION REQUIREMENTS

9.01 Any person operating a transfer station for solid waste within the State of Delaware shall;

- a. prepare daily and maintain (for minimum period of three years after preparation) records of the solid waste handled at the transfer station showing the source and final disposition of such waste after removal from transfer station, including address of such final disposition. The records to be maintained shall be adequate to provide all information required by the Transfer Station Monthly Solid Waste Report, annexed hereto as Exhibit B;
- b. submit the report required by paragraph 9.01(a) of these Regulations and verify the accuracy thereof to DSWA on or before the twentieth (20th) day of the month following the month for which the report is compiled. The report shall be in the form of the Transfer Station Monthly Solid Waste Report, annexed hereto as Exhibit B;
- c. make the records required to be maintained and preserved by paragraph 9.01(a) of these Regulations available for inspection by representatives of DSWA during normal business hours.

~~9.02 Solid waste originating or collected outside the State of Delaware shall not be mixed, combined, or aggregated at any transfer station with solid waste originating or collected within the State of Delaware that, in accordance with these Regulations, must be delivered to a Solid Waste Facility.~~

~~9.03 It shall be the responsibility of the transfer station operator and those persons hauling to and from the transfer station to assure that all solid waste collected within the State of Delaware, and required to be delivered to a Solid Waste Facility by these Regulations, be delivered to the appropriate Solid Waste Facility.~~

~~9.04~~ 9.02 DSWA through its designated representatives shall have the right to inspect the transfer station and solid waste hauling vehicles entering and leaving the transfer station.

~~X. INFECTIOUS WASTE (RESERVED)~~

~~XI. XREVIEW, ENFORCEMENT AND SANCTIONS~~

~~H.01~~ 10.01

a. Any person seeking a license or to have solid waste disposed of at a Solid Waste Facility who has been aggrieved by a determination of the CEO or his designee under Section 3.19, 3.21, 4.02, 4.04, 5.01 (b) or 5.04 of these Regulations may seek review thereof by the Directors of DSWA by filing a request for review with the CEO within fifteen (15) days of receipt of notice of such determination. The hearing shall be held in accordance with the paragraph of Section ~~H~~ 10.01 (b) of these Regulations.

b.

i. The person filing the request for review under paragraph ~~H~~ 10.01 (a) of these Regulations shall be provided notice by registered mail at least fifteen (15) days before the time set for the hearing. The person filing the request for the hearing shall bear the burden of proof.

ii. The person requesting the hearing may appear personally or by counsel and may produce competent evidence in his behalf. Upon the request of the person requesting the hearing or the CEO, the Chairman of DSWA shall issue subpoenas requiring the testimony of witnesses and the production of books, records, or other documents relevant to the material involved in such hearing.

iii. All testimony at the hearing shall be given under oath and the Chairman shall administer oaths and all Directors shall be entitled to examine witnesses.

iv. The hearing may be held as part of a regular meeting or a special meeting of the Directors of DSWA. Deliberation shall be held in executive session.

v. The decision of the Directors of DSWA shall be announced at a public meeting and shall be forwarded to the person requesting the hearing in written form by registered mail.

~~H.02~~ 10.02 Any person who violates a provision of these Regulations shall be subject to the following sanctions:

a. If the violation has been committed, a civil penalty of not less than One Hundred (\$100) Dollars and not more than Five Thousand (\$5000) Dollars shall be assessed;

b. If a violation continues for a number of days, each day of such violation shall be considered a separate violation;

c. If the violation is continuous, or there is substantial likelihood that it will reoccur, DSWA may seek a temporary restraining order, a preliminary injunction or permanent

# FINAL REGULATIONS

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injunction;

d. Any person holding a license issued by DSWA who violates these Regulations shall be subject to revocation of such license, or suspension of such license for such period as determined by DSWA.

e. DSWA personnel are empowered to issue written notices of violations of these Regulations, without the need to employ the sanctions set forth above.

~~11.03~~ 10.03 Any person who violates a provision of these Regulations may be prevented from entering a Solid Waste Facility, as determined by the CEO or his designee, until that person is in compliance with these Regulations.

## EXHIBIT A

TO: DELAWARE SOLID WASTE AUTHORITY  
 P. O. BOX 455  
 DOVER, DE 19903-0455

I hereby apply for a Solid Waste Collectors License for the period of July 1, 19\_\_\_\_ through June 30, 19\_\_\_\_, in accordance with the Regulations of the Delaware Solid Waste Authority. Accordingly, the following is submitted:

(Note: This application will not be processed unless all requested information is provided. Each application must be accompanied by:

1. Proof of insurances as required by Section 3.04;
2. The minimum Bond or Surety, as required by Section 3.10; and,
3. The vehicle information as requested in Attachment A of this application.)
4. A copy of your Delaware Business License.

1. Name of Applicant (Individual or Firm Name):
2. Company/Trade Name:
3. Business Office address/telephone numbers (One number MUST be a Delaware number):

| OFFICE | ADDRESS                      | PHONE # |
|--------|------------------------------|---------|
| A.     | <i>Street City State Zip</i> | (     ) |
| B.     | <i>Street City State Zip</i> | (     ) |
| C.     | <i>Street City State Zip</i> | (     ) |

4. Name, address & telephone number of answering service if applicable:

| NAME | ADDRESS                      | PHONE # |
|------|------------------------------|---------|
|      | <i>Street City State Zip</i> | (     ) |
|      | <i>Street City State Zip</i> | (     ) |
|      | <i>Street City State Zip</i> | (     ) |

5. Name of individuals having administrative responsibility at each business location:

| NAME | ADDRESS                      | PHONE # |
|------|------------------------------|---------|
|      | <i>Street City State Zip</i> | (     ) |
|      | <i>Street City State Zip</i> | (     ) |
|      | <i>Street City State Zip</i> | (     ) |

6. Name, address, telephone number of Registered Agents or Authorized Representatives:

| NAME | ADDRESS                      | PHONE # |
|------|------------------------------|---------|
|      | <i>Street City State Zip</i> | (     ) |
|      | <i>Street City State Zip</i> | (     ) |
|      | <i>Street City State Zip</i> | (     ) |

7. Type of Business:

Sole Proprietorship Partnership Municipality Corporation\*

\* If Non-Delaware Corporation, provide proof of Delaware Registration

8. Date Business was Established:

9. Delaware Business License Number: (contact Division of Revenue)

10. DNREC Waste Haulers Permit Number:

11. Delaware Business License Renewal Date:

12. Federal Taxpayer Identification Number:

13. Name & address of owners or partners in unincorporated business. Indicate respective ownership interest on a percentage basis:

| NAME | ADDRESS                               | % |
|------|---------------------------------------|---|
|      | _____<br><i>Street City State Zip</i> |   |

14. Name & address of Officers, Directors, Shareholders holding in excess of 10% of issued Stock in incorporated business:

| NAME | ADDRESS                               | % |
|------|---------------------------------------|---|
|      | _____<br><i>Street City State Zip</i> |   |

15. Indicate if any partnership or corporation other than applicant has any interest, direct or indirect, in the license applied for, or in the business conducted under such license. (If so, state names & addresses and interest of the partnerships, corporations and principles involved, indicating the nature and extent of the interest.)

Not applicable

Provide details if applicable:

\_\_\_\_\_

\_\_\_\_\_

16. Indicate if any individual, partnership or corporation other than applicant receives or will receive (by way of rent, salary or otherwise) all or any portion of percentage of the gross or net profits or income derived from business conducted under license applied for:

Not applicable

Provide details if applicable:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

# FINAL REGULATIONS

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17. Indicate if your company or parent company has ever been convicted of civil or criminal offenses concerning waste transporting, processing, or disposal.

No    Yes (provide details on separate sheet)

18. Indicate if the applicant, any person mentioned in the application, or any person having a beneficial interest in the application has ever been denied an application to collect solid waste.

Not applicable  
Provide details if applicable:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

19. State general area served by applicant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

20. Indicate days of the week collections are made:

Mon    Tue    Wed    Thur    Fri    Sat    Sun

21. Daily average weight of Household solid waste collected: \_\_\_\_\_ Tons

22. Daily average weight of Municipal solid waste collected: \_\_\_\_\_ Tons

23. Daily average weight of Commercial/Industrial solid waste collected: \_\_\_\_\_ Tons

24. Indicate location(s) where solid waste is being or will be delivered: \_\_\_\_\_ Tons

| TYPE OF WASTE | LOCATION DELIVERED |
|---------------|--------------------|
|               |                    |
|               |                    |
|               |                    |
|               |                    |
|               |                    |

25. Statement of experience in solid waste collection, transportation, and/or disposal:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I HEREBY CERTIFY THAT THE INFORMATION PROVIDED HEREIN AND ATTACHED HERETO IS TRUE AND CORRECT AND THAT I HAVE READ AND AM FAMILIAR WITH THE REQUIREMENTS OF THE REGULATIONS OF THE DELAWARE SOLID WASTE AUTHORITY.

Date                      Signature of Applicant                      Title

STATE OF    COUNTY OF

Before me appeared \_\_\_\_\_, who under oath certifies that the information provided in this application is true and correct.

Date                      Notary Public

## EXHIBIT B

### TRANSFER STATION MONTHLY SOLID WASTE REPORT

From: \_\_\_\_\_ Reporting Period: \_\_\_\_\_  
To: Delaware Solid Waste Authority Date: \_\_\_\_\_

| TYPE OF WASTE  | TONS RECEIVED | TONS DISPOSED | DISPOSAL FACILITY<br>Tons Location |
|--|---------------|---------------|------------------------------------|
| SOLID WASTE DSWA REGULATIONS, SECTION 5              |               |               |                                    |
| a. Delaware  |               |               | 1. _____                           |
|  |               |               | 2. _____                           |
|  |               |               | 3. _____                           |
|  |               |               | 4. _____                           |
| b. Other   |               |               | 1. _____                           |
|  |               |               | 2. _____                           |
|  |               |               | 3. _____                           |
|  |               |               | 4. _____                           |
| <u>TOTAL</u>   |               |               |                                    |
| INDUSTRIAL PROCESS WASTE DSWA REGULATIONS, SECTION 3 |               |               |                                    |

|                    |  |  |    |  |
|--------------------|--|--|----|--|
| a. Delaware        |  |  | 1. |  |
|                    |  |  | 2. |  |
|                    |  |  | 3. |  |
|                    |  |  | 4. |  |
| b. Other           |  |  | 1. |  |
|                    |  |  | 2. |  |
|                    |  |  | 3. |  |
|                    |  |  | 4. |  |
| <u>TOTAL</u>       |  |  |    |  |
| <u>GRAND TOTAL</u> |  |  |    |  |

**CERTIFICATION** I hereby certify that the above information is true and correct, to the best of my knowledge, this day of \_\_\_\_\_, A.D. 19\_\_\_\_.

Notary Public                      President

**Differential Disposal Fee Program**

The Delaware Solid Waste Authority (“Authority”), pursuant to the provisions of 7 Del. C. Ch. 64, hereby adopts the following program applicable to the fee for disposal of solid waste at authority facilities:

1. The base rate for disposal of solid waste (excluding special and industrial process solid waste) shall be \$58.50 per ton.

2. For those persons entering into a contract with the Authority to bring all of their solid waste (excluding special and industrial process solid waste) which has been collected in the State of Delaware to Authority facilities, the rebates set forth shall be paid by the Authority subject to the following:

a. The contract term shall be from the effective date to June 30, 2002, July 1, 2000 to June 30, 2002, or July 1, 2001 to June 30, 2002.

b. A rebate of \$10.00 shall be paid for each ton of solid waste (excluding special and industrial process solid waste) delivered to Authority facilities and for which the base rate disposal fee of \$58.50 per ton has been paid to the Authority. The rebate shall be paid for the following periods in which the solid waste (excluding special and industrial process solid waste) has been delivered:

- (i) Effective date through June 30, 1999
- (ii) July 1, 1999 through June 30, 2000
- (iii) July 1, 2000 through June 30, 2001

(iv) July 2001 through June 30, 2002

c. The rebate for the periods set forth in Paragraph 2(b) above shall be paid within forty-five (45) days after full payment has been made to the Authority by the person entitled to the rebate, for the solid waste (excluding special and industrial process solid waste) delivered during the applicable period.

d. An additional rebate shall also be paid in the event that the solid waste (excluding special and industrial process solid waste) delivered to the authority facilities exceeds 800,000 tons for any of the following periods:

- (i) July 1, 1999 to June 30, 2000
- (ii) July 1, 2000 to June 30, 2001
- (iii) July 1, 2001 to June 30, 2002

For each ton of solid waste (excluding special and industrial process solid waste) in excess of 800,000 tons paid for at the base rate and delivered to Authority facilities during each period identified immediately above, the Authority shall set aside the sum of \$8.50 per ton in a fund which shall be divided among those persons entering into contracts with the Authority and/or participating in this program. Each such person shall be entitled to a share of the fund based on the percentage of solid waste (excluding special and industrial process solid waste) which such person delivers to Authority facilities as a part of the total of all solid waste (excluding special and industrial process solid waste) delivered to authority facilities by (1) all persons under contract with the authority, and (2) all the municipalities, political subdivisions and governmental instrumentalities and entities. The additional rebate for the periods set forth in this Paragraph 2(d) shall be paid within forty-five (45) days after full payment has been made to the Authority by the persons entitled to the rebate.

e. In order to enter into the program, persons delivering solid waste (excluding special and industrial process solid waste) collected in the State of Delaware shall execute contracts with the Authority (I) prior to the effective date for the contract term from the effective date to June 30, 2002; (ii) on or before June 30, 2000 for the contract term July 1, 2000 to June 30, 2002; and (iii) on or before June 30, 2001 for the contract term July 1, 2001 to June 30, 2002.

3. Those persons not under contract with the authority shall be entitled to use the Authority facilities for disposal of solid waste collected in the State of Delaware, subject to payment of such rate or rates established by the Authority, and subject to compliance with the regulations and requirements of the authority and other applicable laws and regulations.

4. The contracts utilized to effectuate this program shall be uniform and shall be consistent with the operative provisions of the program as set forth herein, and shall contain such other terms and conditions deemed desirable and acceptable to the Authority. Anything to the contrary

contained herein notwithstanding, municipalities, political subdivisions and governmental instrumentalities and entities which deliver to Authority facilities all their solid waste (excluding special and industrial process solid waste) collected in the State of Delaware shall be entitled to the full benefits of this program, without the need of entering into a contract with the authority. The contracts shall inure to the benefit of and be binding on the persons, including their successors, assigns, parents, subsidiaries, affiliates, partners, joint venturers, divisions, and all other entities existing or newly formed, controlled directly or indirectly by such persons, through change in ownership or status by transfer of assets or otherwise, and which engage in the collection and/or transportation of solid waste (excluding special industrial process solid waste) generated in the State of Delaware.

5. This Program shall be available to all persons having active accounts with the Authority effective January 1, 1999 and who have delivered to authority facilities during the preceding twelve (12) month period a total of at least one hundred (100) tons of solid waste (excluding special and industrial process solid waste). For new accounts with the Authority after January 1, 1999, persons establishing such accounts shall be entitled to enter the program provided:

(a) the uniform contract referenced in Paragraph 4 herein is executed within sixty (60) days of the date the new account is established;

(b) the term of the contract extends to June 30, 2002;

(c) the new account is with a new person, and not a person having an account with the authority as of January 1, 1999; and

(d) the program benefits do not come into effect until sixty (60) days after the new account is established.

6. For purposes of this program the term "person" is defined to mean any individual, partnership, corporation, association, institution, cooperative enterprise, municipality, commission, political subdivision or other duly established legal entity. The term "person" shall also include successors, assigns, parents, subsidiaries, affiliates, partners, joint venturers, divisions, and all other entities existing or newly formed, controlled directly or indirectly by the person, through change in ownership or status by transfer of assets or otherwise.

7. This program shall become effective on the effective date established by the Authority and continue until June 30, 2002.

### **Amendment to the Statewide Solid Waste Management Plan**

#### **INTRODUCTION**

On August 31, 1998 the Delaware Solid Waste Authority ("DSWA") announced that it was initiating the

process of updating its Statewide Solid Waste Management Plan ("Plan") which was last amended on May 24, 1994. As part of the process, written comments were solicited from the public by October 2, 1998, and it was indicated that public workshops would be held to discuss comments and develop a framework/outline for the initial draft of the Plan revision.

In addition to the comprehensive process of updating the Plan, the DSWA is undertaking this limited Plan amendment in conjunction with regulation changes to afford the DSWA greater solid waste management program flexibility. The management flexibility is set forth hereafter and is intended to supplement the existing Plan. To the extent that there is any inconsistency, this proposed Plan amendment supercedes.

#### **BACKGROUND**

The DSWA has been directed by the Delaware General Assembly to carry out specific statutory responsibilities under 7 Delaware Code Chapter 64 (see appendix A of the Plan as adopted May 1994). Some of those responsibilities include:

1. That a statewide comprehensive program for management, storage, collection, transportation, utilization, processing and disposal of solid waste be established.

2. That a program for the maximum recovery and reuse of materials and energy resources derived from solid wastes be established.

3. That a program for protecting the land, air, surface, and groundwater resources of the State from depletion and degradation caused by improper disposal of solid waste be established.

4. That a statewide solid waste management plan be developed and implemented by DSWA.

In order to fulfill those responsibilities, the Delaware General Assembly provided DSWA with statutory capabilities. Some of those capabilities include:

1. Plan, design, construct, finance, manage, own, operate and maintain solid waste management facilities.

2. The receipt, transfer, storage, transportation, and handling of solid waste and development of support facilities as deemed necessary by DSWA.

3. Being granted all powers necessary to fulfill these purposes and to carry out assigned responsibilities.

4. Develop, implement and supervise a program requiring all persons who haul, convey or transport any solid waste to obtain a license from DSWA.

5. Charge reasonable fees for services.

6. Control, through regulation or otherwise, the collection, transportation, storage and disposal of solid waste, and sanction any person who violates a regulation or a license condition.

7. Establishment of fees and charges for owners and occupants of real estate to support budgeting needs.

8. Utilize private industry to the maximum extent feasible to perform planning, design, management, collection, construction, operation, manufacturing, and marketing functions related to solid waste disposal and resources recovery.

9. Assist in the development of industrial enterprises based upon resources recovery, recycling, and reuse.

10. Purchase, manage, lease or rent real and personal property.

11. Do all things necessary for the performance of its duties, the fulfillment of its obligations, the conduct of its operations and the conduct of a comprehensive program for solid waste disposal and resources recovery, and for solid waste management services.

12. Make short and long range plans for the storage, collection, transportation or processing and disposal of solid wastes and recovered resources by the DSWA-owned facilities.

13. Contract with municipal, county and regional authorities, state agencies and persons to provide waste management service in accordance with this chapter and to plan, design, construct, manage, operate and maintain solid waste disposal and processing facilities on their behalf.

14. Utilize private industry, by contract, to carry out the business, design, operating, management, marketing, planning and research and development functions of the DSWA or the DSWA may determine that it is in the public interest to adopt other courses of action.

15. Enter into a contract or contracts with any municipality providing for or relating to the collection or treatment and disposal of garbage, solid wastes and refuse originating in the municipality and the cost and expense of such collection or treatment and disposal.

The DSWA has, under its statutory provisions implemented projects to meet the legislated mandate. Such projects include:

- Delaware Reclamation Project
- Cherry Island Landfill Phases I – V
- Intermediate Processing Center
- Pigeon Point Transfer Station
- Pinetree Corners Transfer Station
- Sandtown Landfill Areas A – E
- Jones Crossroads Landfill Cells 1 – 3
- Recycle Delaware Centers (120 locations)
- Recyclables Marketing Program
- Collection Stations (5 locations)
- Household Hazardous Waste Collection
- Public Education Program

DSWA by contract has participated as a customer in private sector owned facilities such as Waste to Energy

projects and recycling centers.

The DSWA has identified several future projects to continue to meet its legislative mandate. Such projects include:

- Delaware Recycling Center / Materials Recovery Facility

- Central Solid Waste Management Center: Transfer Station / Materials Recovery Facility

- Southern Solid Waste Management Center: Transfer Station / Materials Recovery Facility

- Cherry Island Landfill Phase VI

- Pine Tree Corners Transfers Station Expansion

- Sandtown Landfill Areas F – H

- Jones Crossroads Landfill Cells 4 – 6

- Statewide Site Development

- Transportation Operations and Maintenance Centers

The DSWA's enabling legislation establishes a statewide solid waste management system which is unique. The scope of the DSWA's responsibilities are broad and the DSWA has implemented a program which not only meets state needs, but which is regional in nature. To support the DSWA's program, which has involved significant out of state disposal of solid waste, the DSWA has chosen among available management options, a statutorily authorized method of directing the flow of certain solid waste generated in the state to DSWA facilities. Although the DSWA's method of controlling waste flow is considered valid, the decision of the United States Supreme Court rendered in C. A. Carbone, Inc. v. Town of Clarkstown has caused all flow methods to be scrutinized.

Faced with constantly changing solid waste disposal objectives and alternatives, many of which could decrease the DSWA's participation in out of state disposal activities and involvement with out of state interests, the DSWA finds it necessary to have available the maximum flexibility possible to structure a program which best meets the needs of the citizens of the state and protects the public health and the environment. Accordingly the DSWA by this amendment to the Plan identifies the alternatives available to the DSWA for replacing the current method of flow control.

#### SOLID WASTE MANAGEMENT OPTIONS

In addition to the alternatives set forth in Chapter IV of the Plan, the DSWA shall have available the following solid waste management options:

1. The provision by contract with solid waste haulers for solid waste collection and transportation services.

2. The provision of recycling services.

3. Use of differential pricing for solid waste disposal fees.

4. Establishment of fees and charges for owners and occupants of real estate to satisfy budgetary needs.

5. Construction or acquisition in whole or in part of facilities to satisfy solid waste collection, transportation, transfer, recycling or disposal needs.

The DSWA, in reviewing the management system options available for establishing user fees, considers differential pricing for solid waste disposal to be the preferable alternative of the options set forth above. The DSWA in implementing management options may utilize DSWA staff or contract for services. The DSWA may enter into short or long-term agreements under such terms and conditions considered desirable by the DSWA. The DSWA may set and modify the fees it charges in implementing any of the management options. In selecting and implementing options, alternatives and ancillary program features, including the establishment and modification of fees, the DSWA shall act through Resolution of its Board of Directors.

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**DEPARTMENT OF  
ADMINISTRATIVE SERVICES  
DIVISION OF PROFESSIONAL REGULATION  
BOARD OF FUNERAL SERVICES**

Statutory Authority: 24 Delaware Code,  
Section 3105(a)(1) (24 Del.C. 3105(a)(1))

WHEREAS, on July 15, 1998, the Board of Funeral Services (Board) promulgated changes to its Rules and Regulations that were published in the Register of Regulations on August 1, 1998;

WHEREAS, on July 17, 1998, the law in 24 Del.C. Chapter 31 relating to the Board of Funeral Services was amended by H.B. No. 629;

NOW, THEREFORE, the Board of Funeral Services makes the followings findings and changes necessary to conform to the new statute:

**I. Summary of the Evidence.**

No written comment was received from the public. Verbal comment was made by George Short and Thomas Melvin of the Delaware State Funeral Directors Association (Association). The notice of the changes would be more efficiently delivered to members if sent to the President or Vice-president instead of the Executive Secretary of the Association who frequently travels.

**II. Findings of Fact**

Rule changes are necessary to be in conformity with statutory changes in H.B. 629 effective July 17, 1998. Rule 1.4 will be modified from the version published to be in

compliance with the new statute and requires no further notice. 29 Del.C. Section 10113).

Future notices to the Association will be made to its President..

**III. Decision**

A majority of a quorum of the Board of Funeral Services adopts the following changes to the rules and regulations:

1. Rule 1.3 is repealed in its entirety.
2. Rule 1.4 (formerly 1.5) is amended and shall read as follows: "In order for an applicant to apply for an internship of one year's duration under the auspices of a licensed Delaware Funeral Services practitioner pursuant to 24 Del.C. Section 3107(a)(4), the applicant shall have certified that he or she has graduated from an accredited high school, or its equivalent, and has received an Associate Degree in mortuary science, consisting of 60 credit hours, from a school fully accredited by the American Board of Funeral Services Education, or its successor."
3. Rule 1.5 (formerly 1.6) is amended by deleting the beginning phrase "As required by 24 Del.C. §3107,"
4. Rule 1.6 (formerly 1.7) is amended by replacing the provision for "ninety (90)" semester hours with "sixty (60)" semester hours and deleting the parenthetical "(as required by Rules 1.2 through 1.4)" and the phrase "as required by 24 Del.C. §3107."
5. Rule 1.7 (formerly 1.8) is amended by deleting the phrase "required by 24 Del.C. §3107".
6. References to Code section numbers are hereby changed throughout the regulations to be consistent with the recently enacted Chapter 31 of Title 24 of the Delaware Code.

**IV. Text**

The text of the rules is as set forth in the Register of Regulations published January 1, 1999 with the following exceptions:

1. Rule 1.3 (formerly 1.4) -- the reference to section 3106 is changed to 3107
2. Rule 1.4 the text is as set out above
3. Rule 3.0 the reference to 3121(1) is changed to 3117(a)(1) and the reference to 3121(a)(2) is changed to 3117(a)(2)
4. Rule 8.7 Continuing Education Committee is renumbered 8.5 and repositioned so that the numbers are consecutive.
5. The paragraph entitled "Effective date" following the Code of Ethics is hereby deleted.

**V. Effective date.**

The changes to the Rules and Regulations of the Board of Funeral Practice are effective 10 days following publication in the Register of Regulations.

SO ORDERED this 17th day of March, 1999.

#### BOARD OF FUNERAL SERVICES

Gary J. Wallick, President  
 Richard W. Harra  
 Charles P. Arcaro  
 Kelly A. Pepper  
 Barbara R. Robbins  
 Dorothy J. Sapp  
 J. Thomas Sturgis, Jr., PhD.

A revision of the Rules and Regulations governing the State Board of Funeral Services of the State of Delaware, adopted and promulgated this 20th day of May, 1998 at Dover, Delaware. These Rules and Regulations are hereby adopted pursuant to 24 Del. C. Section 3105 (a)(1) and the Administrative Procedures Act, 29 Del. C. Section 10115. These regulations supersede and replace any previous adopted rules, regulations or bylaws by the State Board of Funeral Services.

#### Duties of the Officers

1. The President shall preside at all meetings, call meetings, sign certificates with other Board members or other forms that may be required by him or her by law.

2. In the absence of the President, the Secretary shall preside at the meetings and call meetings when the President is absent. However, the signatory duties of the President may not be transferred to the Secretary.

3. In accordance with 29 Del. C. Section 8807, the Division of Professional Regulation shall maintain and keep all records of licensed funeral directors in the State of Delaware issuing a number and date to each license.

4. The Division shall also cause to be collected all fees including license application fees, renewal fees or any other fee required to be filed for paid in accordance with the provisions of 24 Del. C. ch. 31, et seq.

5. In accordance with the Freedom of Information Act, 29 Del. C. Section 10004 (c) the Division of Professional Regulation shall publish an agenda of all meetings which shall include the time, dates and places of said meetings and an agenda. The Board shall also give public notice of the regular meetings and its intent to hold an executive session closed to the public at least seven days in advance. However, the agenda may be subject to change to include additional items not on the agenda including executive sessions closed to the public which arise at the time of the Board's meeting.

6. The Division of Professional Regulation shall insure that accurate and detailed minutes of all business to come before the Board at all Board meetings be transcribed in accordance with 29 Del. C. Section 8807 and 24 Del. C. Section ~~3104~~ 3103 (d).

#### RULES AND REGULATIONS - LICENSURE REQUIREMENTS

##### Rule 1.0

Requirements for licensing of those applying for a Funeral Director's License in the State of Delaware. The qualifications of applicants for licensure as funeral director are contained in 24 Del. C. Section ~~3106~~ 3107 (a) ~~(1-5)(1)-(9)~~ and 24 Del. C. Section ~~3108~~ 3109.

##### Rule 1.2

A year of academic training shall consist of at least thirty (30) semester hours successfully completed by the applicant at an accredited college or university. Two years of academic training shall consist of at least sixty (60) semester hours successfully completed by the applicant at an accredited college or university. The applicant shall request that a copy of an official transcript be sent to the Board.

##### Rule 1.3

~~If an applicant has attended a school or college fully accredited by the American Board of Funeral Services Education or its successor, and has received a certificate of satisfactory completion in a one year program, the applicant shall be required to complete an additional (60) semester credit hours at an accredited college or university.~~

##### Rule 1.4

An applicant who has attended a school or college fully accredited by the American Board of Funeral Service Education "ABFSE" or its successor and who, after attending such ABFSE accredited school or college, has received an Associate degree in Funeral Services, wherein such "degree" required the successful completion of at least sixty (60) semester credit hours, ~~shall in addition thereto to such ABFSE accredited Associate's Degree, receive and complete academic training at an accredited college or university and successfully completed at least thirty (30) additional semester credit hours to be eligible for licensure as a funeral director in accordance with the educational requirements contained within 24 Del. C. Section ~~3106~~ [3107].~~

##### Rule 1.4 Rule 1.5

In order for an applicant to apply for internship of one year's duration under the auspices of a licensed Delaware Funeral Services practitioner pursuant to 24 Del. C. Section ~~3106~~ (a)(3) 3107 (a)(4), the applicant shall have certified that he or she has graduated from an accredited high school or its equivalent, ~~[and completed at least two years of academic training]~~ **and has received an Associate Degree in Mortuary Science, consisting of sixty (60) credit hours** from an accredited college or university. In addition, the applicant shall certify that he or she has completed one year

of academic training in funeral services from a school or college fully accredited by the American Board of Funeral Service Education or its successor.

Rule 1.5 ~~Rule 1.6~~

~~As required by 24 Del. C. Section 3107, the~~ The Division, upon request of an eligible applicant, shall administer a State examination based solely upon the laws and regulations of Delaware ~~and other jurisdictions which impact on, relate to and govern its profession.~~ An applicant for full licensure whether via initial or reciprocal licensure, prior to applying for the Division's test based upon the law and regulations of Delaware ~~and other jurisdictions which impact on Delaware licensees~~ ("State" examination) shall first sit for and successfully complete the national examination required by 24 Del. C. Section 3105 (a)(3), the written examination prepared by a national professional organization recognized by the American Board of Funeral Services Education by a passing score determined by the organization preparing the test recognized by the American Board of Funeral Services Education. The national examination may be taken before or during the internship.

Rule 1.6 ~~Rule 1.7~~

As required by 24 Del. C. Section 3106 (a)(3) 3107 (a)(4), an applicant other than one seeking licensure via reciprocity shall satisfactorily complete an internship of one year's duration in a licensed Delaware funeral establishment under the auspices of a licensed Delaware funeral service practitioner. An applicant must successfully complete the required total of ~~ninety (90)~~ sixty (60) semester hours of academic training ~~(as required by Rules 1.2 through 1.4)~~ prior to beginning the internship. An application to sit for the State examination ~~as required by 24 Del. C. Section 3107~~ shall be accompanied by a notarized statement from the Funeral Service Practitioner under whom the applicant "intern" as defined by 24 Del. C. Section 3103 3101 (8) served his internship. The notarized statement shall attest that the applicant has concluded his/her internship and submitted to the Board satisfactory evidence of the completion of twenty-five (25) embalming reports and four (4) completed quarterly work reports.

Rule 1.7 ~~Rule 1.8~~

The State examination ~~required by 24 Del. C. Section 3107~~ shall consist of questions pertaining to the law and regulations of the State of Delaware ~~and other jurisdictions and which may govern, impact on, and relate to the profession including preneed funeral services contracts, consumer protection law and regulations, and laws and regulations governing crematories and cemeteries.~~ An applicant shall be deemed to have successfully passed the "state examination" with a minimum grade of 70%.

Federal Trade Commission Regulations

Rule 2.0

A licensed funeral director in the State of Delaware shall comply with all Federal Trade Commission Regulations governing the pricing of funeral services and merchandise and the method of payment for funeral services as defined under 24 Del. C. Section 3101 (4)(7). Upon the issuance of a funeral director's license, a licensed funeral director represents that he/she is familiar with all Federal Trade Commission rules and regulations and shall abide by the same. A licensee may be subject to discipline pursuant to 24 Del. C. Ch.31, et seq. if these rules or regulations have been violated by the licensee.

Establishment Permits

Rule 3.0

The requirements for the issuance, continuance, and proper maintenance of a funeral establishment permit are contained in 24 Del. C. Section 3121 3117. In accordance with 24 Del. C. Section 3121 (1) 3117 (a) (2) the funeral establishment shall be conducting funeral services from a building that is appropriate as defined in 24 Del. C. Section 3101 (5). All establishments, both newly issued and those grandfathered by Section ~~3121 (a)(2)~~ 3117 (a)(1) shall in said building have preparation rooms which shall be locked. Licensed funeral directors shall exercise full control over preparation rooms and supplies.

Rule 3.1

All funeral establishments provided a permit in accordance with the requirements of 24 Del. C. Section 3121 3117 shall, in addition to conforming with all safety requirements of the State Department of Health and Social Services, provide the following:

- 1.(a.) A room for the preparation and embalming of human remains;
- 1.(b.) Said preparation room shall contain embalming equipment and supplies.

Rule 3.2

Funeral Establishment Permit: Circumstances for termination and continuation.

The statutory requirements for the issuance of a funeral establishment permit are contained in 24 Del. C. Section 3121 3117.

To be exempt from the provisions of 24 Del. C. Section 3121 3117 (a)(2), the funeral establishment shall have been maintained, operated and conducted on a continuous basis prior to September 6, 1972 until the present date. Further, only the record owner of the funeral establishment shall be entitled to obtain said exemption. No assignment of the exemption rights contained in 24 Del. C. Section 3121 (a)(2)

is permitted and no other licensed funeral director may apply for or be assigned said rights.

### Rule 3.3

If a licensed funeral director relocates or otherwise moves a funeral establishment that has been granted an exemption pursuant to the provision of 24 Del. C. Section ~~3117~~ 3117 (a)(2) from its original location, the exemption allowed under Section ~~3117~~ 3117 (a)(2) shall immediately become null and void. For purposes of this section the terms "move" or "relocate" is defined as to place such establishment outside the original building's location at its exact address of record unless the building where the funeral establishment permit is contained is renovated.

### Duplicate Certificate

### Rule 4.0

Any licensed funeral director may obtain a duplicate funeral director's certificate upon proof of satisfactory evidence to the Board that the original has been lost or destroyed and a payment of a fee as set by the Division of Professional Regulation.

### Suspension, Revocation, or Lapse of Funeral Director's License

### Rule 5.0

During any period a licensed funeral director's license has lapsed, been revoked or suspended by the Board in accordance with 24 Del. C. Section ~~3110~~ 3111 or Section ~~3115~~ 3114, no other licensed funeral director in the State of Delaware may register death certificates or secure burial permits for the licensee whose license has been revoked, suspended or has lapsed. Nor shall the licensee whose license has lapsed, been revoked or suspended by the Board, be able to register death certificates or secure burial permits. The Board may notify the Division of Public Health, the Department of Health and Social Services, the Medical Examiner's Office or other appropriate state or federal agency that said funeral director is prohibited from practicing funeral services as defined by Chapter 31 of Title 24.

### Cash Advance

### Rule 6.0

A licensed funeral director in the State of Delaware is prohibited from billing or causing to be billed any item that is referred to as a "cash advance" item unless the net amount paid for such item is for funeral services in the same amount as is billed by the funeral director. A cash advance item is payment made by the funeral director for the consumer to a third party including but not limited to cemetery fees, crematory fees, death certificates and florists.

(The effective date of these regulations is the 6th day of December, 1989 in accordance with 29 Del. C. Section 10118 (b).)

The following rules are adopted by the board as a supplement to the Rules and Regulations governing the State Board of Funeral Services, previously adopted and promulgated on the 6th day of December, 1989 pursuant to Del. C. Section 3105 (a)(1) and the Administrative Procedures Act, 29 Del. C. Section 10115.

### Code of Ethics

### Rule 7.0

The following is adopted as the code of ethics for all funeral service licensees in the State of Delaware.

1. As funeral directors, we herewith fully acknowledge our individual and collective obligation to the public, especially to those we serve, our mutual responsibilities for the proper welfare of the funeral services profession.

2. To the public we pledge; vigilant support of public health laws; proper legal regulations for the members of our profession; devotion to high moral and service standards; conduct befitting good citizens, honesty in all offerings of service and merchandise to the public and all business transactions.

3. To those we serve we pledge; confidential business and professional relationships; cooperation with the customs, laws, religions and creeds; observance of all respect due to the deceased; high standards of confidence and dignity in conduct of all services; truthful representation of all services and merchandise.

4. To our profession we pledge; support of high educational standards and proper licensing law; encouragement of scientific research; adherence to sound business practices; adoption of improved technique; observance of all the rules of fair competition and maintenance of favorable personnel relations.

### Effective Date:

~~[[The effective date of these regulations is the 11th 20th day of August May 1998 in accordance with 29 Del. C. Section 10118 (b).]]~~

### Continuing Education Regulations

### Rule 8.0

#### 1. Board Authority

This rule is promulgated under the authority of 24 Del. C. Section 3105 which grants the Board of Funeral Services (hereinafter "the Board") authority to provide for rules for continuing funeral services education as a prerequisite for

license renewal.

## 2. Requirements

1. Every licensed funeral director in active practice shall complete at least 10 hours/credits of approved continuing education (hereinafter "CE") during the two year licensure period prior to the time of license renewal. Licensees who earn more than the required amount of CE credit hours during a given licensure period may carry over no more than 50% of the total CE credit hours required for the next licensure period.

2. When a Delaware licensee on inactive status files a written application to return to active practice with the Board, the licensee shall submit proof of having completed the required CE credit hours for the period just prior to the request to return to active practice.

3. Upon application for renewal of a license, a funeral director licensee shall submit to the Board proof of completing the required number of CE credit hours.

## 3. Waiver of the CE Requirement

1. The Board has the power to waive any part of the entire CE requirement for good cause if the licensee files a written request with the Board. For example, exemptions to the CE requirement may be granted due to health or military service. Application for exemption shall be made in writing to the Board by the applicant for renewal. The Board shall decide the merits of each individual case at a regularly scheduled meeting.

2. Other exemptions include the following:

a. Newly licensed funeral directors, including those newly licensed by reciprocity, are exempt during the time from initial licensure until the commencement of the first full licensure period.

## 4. Continuing Education Program Approval

1. Each contact hour (at least fifty minutes) is equivalent to 1.0 CE credit hour. One college credit hour is equivalent to 5 CE credit hours.

2. Eligible program providers or sponsors include but are not limited to, educational institutions, government agencies, professional or trade associations and foundations and private firms.

Sources of CE credits include but are not limited to the following:

- a. Programs sponsored by national funeral service organizations.
- b. Programs sponsored by state associations.
- c. Program provided by local associations.
- d. Programs provided by suppliers.
- e. Independent study courses for which there is an assessment of knowledge.

f. College courses.

3. The recommended areas include but are not limited to the following:

- a. Grief counseling
- b. Professional conduct, business ethics or legal aspects relating to practice in the profession.
- c. Business management concepts relating to delivery of goods and services.
- d. Technical aspects of the profession.
- e. Public relations.
- f. After care counseling.

4. Application for CE program approval shall include the following:

- a. Date and location.
- b. Description of program subject, material and content.
- c. Program schedule to time segments in subject content areas for which approval of, and determination of credit is required.
- d. Name of instructor(s), background, expertise.
- e. Name and position of person making request for program approval.

5. Requests for CE program approval shall be submitted to the Board on the application provided by the Board. Application for approval may be made after the program; however, if the program is not approved, the applicant will be notified and no credit given.

6. Approval of CE credits and program formats by the Committee shall be valid for a period of two years from the date of approval. Changes in any aspect of the approved program shall render the approval invalid and the presenter will be responsible for making reapplication to the Committee.

7. Upon request, the Board shall mail a current list of all previously approved programs.

## ~~{7}~~ [5.] Continuing Education Committee

1. The Board of Funeral Services shall appoint a committee known as the Continuing Education Committee. The Committee shall consist of the following who shall elect a chairperson:

- a. One (1) Board member (non-licensed).
- b. One (1) non-Board member who shall be a licensed funeral director who is owner/operator of a funeral establishment.
- c. One (1) non-Board member who shall be a licensed funeral director who does not own or operate a funeral establishment.

2. Membership on this Committee shall be on a rotating basis, with each member serving a three year term and may be eligible for reappointment. The Committee members shall continue to serve until a new member is appointed.

3. The Continuing Education Committee shall oversee matters pertaining to continuing education and make

recommendations to the Board with regard to approval of submitted programs for CE by licensees and with regard to the Board's review of audited licensees. The Board shall have final approval on all matters.

#### 6. Certification of Continuing Education - Verification and Reporting

1. The program provider/sponsor has sole responsibility for the accurate monitoring of program attendance. Certificates of attendance shall be supplied by the program provider/sponsor and be distributed only at the completion of the program.

2. Verification of completion of a independent study program will be made with a student transcript.

3. The funeral director licensee shall maintain all original certificates of attendance for CE programs for the entire licensure period. Proof shall consist of completed CE form provided by the Board and shall be filed with the Board on or before thirty (30) days prior to the expiration date of the biennial renewal period.

4. Applications for renewal may be audited by the Board to determine whether or not the recommended requirements of continuing education have been met by the licensee.

5. If a licensee is found to be non-compliant in continuing education, the licensee's license shall lapse at the expiration of the present licensing period. The Board shall reinstate such license within twelve (12) months of such lapse upon presentation of satisfactory evidence of successful completion of continuing education requirements and upon payment of all fees due.

6. Programs approved for continuing education credit by another state funeral board other than Delaware shall be automatically approved for all Delaware licensees upon written application and verification of CE credits by the applicable state board.

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### **DIVISION OF PROFESSIONAL REGULATION**

#### **BOARD OF OCCUPATIONAL THERAPY**

Statutory Authority: 24 Delaware Code,  
Section 2007(a)(1) (24 Del.C. 2007(a)(1))

Pursuant to the Statutory Authority, the Board of Occupational Therapy, promulgated rules which were published in the Delaware Register of Regulations on February 1, 1999. The Board called a public meeting for March 17, 1999 to consider comments on the rules. The Public was directed to forward written comments to Mary Paskey, at the Division of Professional Regulations by March 17, 1999. This information and notice of the March 17, 1999 Public hearing appeared in the Delaware State

News and the News Journal on February 16, 1999.

#### March 17, 1999 Public Hearing Summary of the Evidence

The Proposed Rules which were published in the Delaware Register on February 1, 1999 are hereby incorporated by reference. Mary Paskey, the Board's Administrative Assistant, reported to the Board, that written comments were not received. The Public was invited to comment on the rules. The comments were as follows: Jill Olshenski was concerned over the interpretation of Rule 1 (C3) with regards to locations and number of OTA who could be supervised; Kathy Scott also raised concerns regarding 1 (C3); Kathy Coudle wanted clarification on the renewal process; Harriet Armstrong was concerned that the guidelines were more generalized; Debbie Thorton believed the rules were more lenient; The Public hearing was adjourned.

#### Findings of the Board

On March 17, 1999, the Board moved to accept the rules as published, except Rule 1 (C3). The Board discussed the Public comments and the concern for the interpretation of Rule 1 (C3). The Board will publish this revision and call a Public Hearing for April 21, 1999 to consider the Rule 1 (C3) as revised.

On April 21, 1999, the Delaware Board of Occupational Therapy re-convened a Public meeting to address the repropoed rule change of Rule 1 (C3), which was published in the Delaware Register of Regulations on April 1, 1999. Notice of this April 21, 1999, Public hearing appeared in the Delaware State News and the News Journal on March 21, 1999. The Notice directed the Public to forward written comments to Mary Paskey, at the Division of Professional Regulation by April 21, 1999.

#### April 21, 1999 Public Hearing Summary of Evidence

The Propoosed Rule 1 (C3), as modified, was published in the Delaware Register on April 1, 1999. Mary Paskey, the Board's Administrative Assistant, reported to the Board that written comments were not received. There were no members of the Public present and therefore, no public comment. The Public hearing was adjourned.

#### Findings of the Board

On April 21, 1999, the Board acknowldged that the Rule 1 (C3), as published did not generate any public comment.

**Decision**

On March 17, 1999, the Board unanimously adopted the proposed rules as published, on February 1, 1999, except Rule 1 (C3),; and on April 21, 1999, the Board unanimously adopted proposed Rule 1 (C3), as published on April 1, 1999, in the Delaware Register of Regulations.

The Rules and Regulations, as adopted, will be published in the Delaware Register of Regulations at the next available publication and will become effective 10 days after the publication.

**\*Please note that no changes were made to the regulations as originally proposed and published in the February 1999 issue of the Register at page 1340 (2:8 Del.R. 1340) and in the April 1999 issue of the Register at page 1698 (2:10 Del.R. 1698). Therefore, the final regulations are not being republished. Please refer to the February and April 1999 issues of the Register or contact the Division of Professional Regulation, Board of Occupational Therapy.**

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**DEPARTMENT OF AGRICULTURE****THOROUGHBRED RACING COMMISSION**

Statutory Authority: 3 Delaware Code,  
Section 10107 (3 Del.C. 10107)

**ORDER**

Pursuant to 29 Del.C. section 10118, the Delaware Thoroughbred Racing Commission ("Commission") hereby issues this Order promulgating the proposed amendments to the Commission Rules 4.01, 3.01(a), 4.09, 4.10, 21.01, and 13.04. Following notice and a period for written comment on the proposed Rules, the Commission makes the following findings and conclusions.

**Summary of Evidence and Information Submitted**

1. The Commission posted public notice of the proposed rule amendments in the Register of Regulations on January 1, 1999. The Commission received no written comments from the public concerning the proposed regulations.

**Findings of Fact**

2. The public was given notice and the opportunity to provide the Commission with comments in writing on the proposed amendments to the Commission's Rules. The Commission received no public comments in response to the proposed rule.

3. The majority of the proposed rule amendments are necessary to ensure consistency between the Commission's

Rules and the recent amendment to the Commission's legislation by House Bill 745, 71 Del. Laws 414 (1998). The amendments proposed to Rules 4.01, 3.01(a), 4.09, 4.10, 21.01 merely add the provisions of the recent amendment to the Commission Rules. The proposed amendment to Rule 13.04 would amend the provisions for claims and permit an owner who races in a partnership to claim horse in his own name. This rule was suggested by the horsemen and the Commission received no comments or opposition to the proposed rule. The Commission finds that proposed rule amendments are necessary to comply with the statutory authority of the Commission under 3 Del.C. Chapter 101 and for the effective enforcement of that chapter. The proposed rule would further the Commission's statutory duty under 3 Del.C. section 10103 to regulate harness racing in the public interest.

**Conclusions**

4. The proposed rule amendments were promulgated by the Commission in accord with its statutory duties and authority as set forth in 3 Del.C. section 10128.

5. The Commission deems the rule amendments to Rules 4.01, 3.01(a), 4.09, 4.10, 21.01, and 13.04 as amended necessary for the effective enforcement of 3 Del.C. Chapter 101 and for the full and efficient performance of its duties thereunder.

6. The Commission concludes that the adoption of the proposed rules would be in the best interests of the citizens of the State of Delaware and necessary to insure the integrity and security of the conduct of thoroughbred racing in the State of Delaware.

7. The Commission, therefore, adopts the following rule amendments to the to the following Rules: 4.01, 3.01(a), 4.09, 4.10, 21.01, and 13.04. A copy of the rules as amended are attached hereto and incorporated herein as exhibit #1 to this Order.

8. The effective date of this Order shall be ten (10) days from the publication of this Order in the Register of Regulations on May 1, 1999.

IT IS SO ORDERED THIS 7<sup>TH</sup> DAY OF APRIL, 1999.

Bernard Daney, Chairman  
Duncan Patterson, Commissioner  
Henry Decker, Commissioner  
Caroline Wilson, Commissioner

1. AMEND Rule 4.01 to now provide as follows:

**4.01 Racing Officials**

The Commission may appoint such officers, clerks, stenographers, inspectors, racing officials, veterinarians, and such other employees as it deems necessary, consistent with the purposes of this chapter. The Commission for the

purpose of maintaining the integrity and honesty in racing shall prescribe by administrative regulation the powers and duties of the persons employed under this section and qualifications necessary to perform those duties.

Persons appointed by the Licensee to serve as Racing Officials during a race meeting must first be approved by the Commission, shall serve only so long as approved by the Commission, and shall be under the supervision of the Stewards. For purposes of these Rules, Racing Officials shall include those persons serving as Steward, Racing Secretary, Assistant Racing Secretary, Clerk of the Scales, Paddock Judge, Starter, Patrol Judge, Placing Judge, Timer, Identifier and Veterinarian.

(a) No person while serving as a Racing Official shall, directly or indirectly, own a beneficial interest in a Thoroughbred, or Jockey contract, or Licensee under his supervision; nor shall he cause to be sold, for himself or another, any Thoroughbred under his supervision; nor shall he wager on any race under his supervision; nor shall he write or solicit horse insurance or have any monetary interest in any business which seeks the patronage of horsemen or racing associates as such. For the purposes of the above, the following, employees shall also be deemed Racing Officials: Assistant Starter, Jockey Room Custodian, Jockey Room Employees, Valets, Outriders.

No person shall be appointed to or hold any such office or position who holds any official relation to any person, association, or corporation engaged in or conducting thoroughbred racing within this state. No Commissioner, racing official, steward or judge whose duty it is to insure that the rules and regulations of the commission are complied with shall bet on the outcome of any race regulated by the Commission. All persons appointed under 3 Del.C. section 10107 (a-c) shall serve at the pleasure of the commission and are to be paid a reasonable compensation.

(b) Racing Officials serving in the capacity of Stewards, Placing and/or Patrol Judges, Clerk of Scales, Starter and Horse Identifier shall have good vision and an ability to distinguish colors correctly.

(c) Any Racing Official who desires to leave his employment during the race meeting must first obtain permission from the Commission; in the event a vacancy occurs among Racing Officials other than Stewards, the Licensee shall promptly appoint a successor, subject to approval of the Commission, in the event the Licensee does not appoint a successor in time to permit the conduct of racing, then the Stewards shall immediately a temporary successor.

2. Repeal existing Rule 3.01(a) and replace with new Rule 3.01(a) to now provide as follows:

### 3.01 Qualifications for Stewards.

No person shall qualify for appointment or approval as a

Steward unless:

(a) In addition to any minimum qualifications promulgated by the Commission, all applicants for the position of Steward must be certified by a national organization approved by the Commission. An applicant for the position of steward must also have been previously employed as a steward, patrol judge, clerk of scales or other racing official at a thoroughbred racing meeting for a period of not less than forty-five days during three of the last five years, or have at least five years of experience as a licensed jockey who has not less than one year as a licensed racing official at a thoroughbred racing meeting or have ten years of experience as a licensed thoroughbred trainer who has served not less than one year as a licensed racing official at a thoroughbred racing meeting.

3. Amend Rules by enacting a new Rule 4.09 to now provide as follows:

#### 4.09 Investigator

The Commission may appoint a racing inspector or investigator for each thoroughbred racing meet. Such racing inspector shall perform all duties prescribed by the Commission consistent with the purposes of Title 3, Chapter 101. Such racing inspector shall have full and free access to the books, records and papers pertaining to the pari-mutuel system of wagering and to the enclosure or space where the pari-mutuel system is conducted at any thoroughbred racing meeting to which he shall be assigned for the purposes of ascertaining whether the holder of such permit is operating in compliance with the Commission's rules and regulations. The racing inspector shall investigate whether such rules and regulations promulgated by the Commission are being violated at such Thoroughbred racetrack or enclosure by any licensee, patron, or other person. Upon discovering any such violations, the racing inspector shall immediately report his or her findings in writing and under oath to the commission or its designee as it may deem fitting and proper. The racing inspector shall devote his full time to the duties of his office and shall not hold any other position or employment, except for performance of similar duties for the Harness Racing Commission.

4. Amend the Rules by enacting a new Rule 4.10 to provide as follows:

#### 4.10 Administrator of Racing

The Commission may employ an Administrator of Racing who shall perform all duties prescribed by the Commission consistent with the purposes of this chapter. The Administrator of Racing shall devote his full time to the duties of office and shall not hold any other office or employment, except that he can perform the same duties as Administrator of Racing for the Harness Racing

Commission. The Administrator of Racing shall be the representative for the Commission at all meetings of the Commission and shall keep a complete record of its proceedings and preserve, at its general office, all books, maps, documents, and papers entrusted to its care. He shall be the executive office of the Commission and shall be responsible for keeping all Commission records and carrying out the rules and orders of the Commission. The Commission may appoint the Administrator of Racing to act as a hearing officer to hear appeals from administrative decisions of the steward of racing judges.

5. Amend Rule 21.01 to now provide as follows:

#### **21.01 Statement of Purpose**

The rules in this part establish and describe requirements, criteria, standards and procedures designed to monitor, test for ultimately control the use of alcohol and drugs by persons within the jurisdiction of the Delaware Thoroughbred Racing Commission. The purpose of these rules is to eliminate, substance and thereby enhance the safety, integrity and decorum of horse racing within the State of Delaware. The Commission shall promulgate administrative regulations for effectively preventing the use of improper devices, the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed or health of horses in races in which they are to participate. The Commission is also authorized to promulgate administrative regulations for the legal drug testing of licensees. The Commission is authorized to contract for the maintenance and operation of a testing laboratory and related facilities, for the purpose of saliva, urine, or other tests for enforcement of the Commission's drug testing rules and regulations. The licensed persons or associations conducting thoroughbred racing shall reimburse the Commission for all costs of the drug testing programs established pursuant to this section. Increases in costs of the aforementioned testing program shall be reasonable and related to the expansion in the number of days of racing and the number of races held, the need to maintain competitive salaries and inflation. The Commission may not unreasonably expand the drug testing program beyond the scope of the program in effect as of June 30, 1998. Any decision by the Commission to expand the scope of the drug testing program that occurs after an administrative hearing, at which the persons or associations licensed under 3 Del.C. 10121 consent to such expansion, shall not be deemed unreasonable expansion for purposes of this section. The Commission, in addition to the penalties contained in 3 Del.C. 10125, may impose penalties on licensees who violate the drug testing regulations including imposition of fines or assessments for drug testing costs.

6. Amend Rule 13.04 to now provide as follows:

#### **13.04 Limits on Claims**

No person shall claim more than one horse from any one race. No authorized agent, representing several owners, shall submit more than one claim for any race. When a stable consists of horses owned by more than one person, trained by the same Trainer, not more than once claim may be entered on behalf of such stable in one race. An owner who races in a partnership may claim his or her individual interest in the individual has started a horse in the partnership. The individual must also have an account with the horseman's bookkeeper that is separate from the partnership account.

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## **DEPARTMENT OF EDUCATION**

Statutory Authority: 14 Delaware Code,  
Section 122(e) (14 Del.C. 122(e))

### **Regulatory Implementing Order**

#### **Use of Quick Relief Asthmatic Inhalers by Students in Schools**

#### **I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED**

The Secretary seeks the consent of the State Board of Education to amend regulation 800.19, Possession, Use or Distribution of Drugs and Alcohol, found in the 800 section of the document Regulations of the Department of Education. The amendment adds a new section, 3.12, which permits students to have quick relief asthmatic inhalers in their possession and to use them during school hours. The purpose of this amendment is to exempt asthmatic inhalers from the phrase in the regulation that forbids students to be in possession of a drug or drug like substance. The amendment requires that a prescription for the drug and parents permission for the student to self medicate be on record in the school nurse's office. It also permits the school nurse to refuse to let the child carry his or her own quick relief asthmatic inhaler if necessary.

Notice of the proposed regulation was published in the News Journal and the Delaware State News on March 12, 1999, in the form hereto attached as Exhibit A. The notice invited written comments and none were received from the newspaper advertisements.

#### **II. FINDINGS OF FACT**

The Secretary finds that it is necessary to amend these regulations because students need to have fast access to their inhaler when an asthma attack occurs during school hours.

#### **III. DECISION TO AMEND THE REGULATIONS**

For the foregoing reasons, the Secretary concludes that

it is necessary to amend the Use, Possession and Distribution of Drugs and Alcohol Regulations. Therefore, pursuant to 14 Del. C., Section 122, the regulations attached hereto as Exhibit B are hereby amended. Pursuant to the provisions of 14 Delaware Code, Section 122(e), the amended regulations shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

#### IV. TEXT AND CITATION

The text of the regulations repealed hereby shall be in the form attached hereto as Exhibit B, and said regulations shall be cited in the document the Regulations of the Department of Education.

#### V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Secretary pursuant to 14 Del. C., Section 122, in open session at the said Board's regularly scheduled meeting on April 15, 1999. The effective date of this Order shall be ten (10) days from the date this Order is published in the Delaware Register of Regulations.

IT IS SO ORDERED this 15th day of April, 1999.

#### DEPARTMENT OF EDUCATION

Dr. Iris T. Metts, Secretary of Education

Approved this 15th day of April, 1999.

#### STATE BOARD OF EDUCATION

Dr. James L. Spartz, President

Jean W. Allen, Vice President

Nancy A. Doorey

John W. Jardine, Jr.

Dr. Joseph A. Pika

Dennis J. Savage

Dr. Claibourne D. Smith

800.19 Possession, Use or Distribution of Drugs and Alcohol July 1998

1.0 The following policy on the possession, use, or distribution of drugs and alcohol shall apply to all public school districts.

1.1 The possession, use and/or distribution of alcohol, a drug, a drug-like substance, a look-alike substance and/or drug paraphernalia are wrong and harmful to students and are prohibited within the school environment.

1.2 Student lockers are the property of the school and may be subjected to search at any time with or without reasonable suspicion.

1.3 Student motor vehicle use to and in the school environment is a privilege which may be extended by school districts to students in exchange for their cooperation in the

maintenance of a safe school atmosphere. Reasonable suspicion of a student's use, possession or distribution of alcohol, a drug, a drug-like substance, a look-alike substance or drug paraphernalia, or of a student's possession of an unauthorized electronic beeper or other communication device in the school environment, may result in the student being asked to open an automobile in the school environment to permit school authorities to look for such items. Failure to open any part of the motor vehicle on the request of school authorities may result in the police being called to conduct a search, and will result in loss of the privilege to bring the vehicle on campus.

1.4 All alcohol, drugs, drug-like substances, look-alike substances and/or drug paraphernalia found in a student's possession shall be turned over to the principal or designee, and be made available, in the case of a medical emergency, for identification. All substances shall be sealed and documented, and, in the case of substances covered by 16 Del. C., ch 47, turned over to police as potential evidence.

2.0 The following definitions shall apply to this policy and will be used in all district policies.

2.1 "Alcohol" shall mean alcohol or any alcoholic liquor capable of being consumed by a human being, as defined in Section 101 of Title 4 of the Delaware Code including alcohol, spirits, wine and beer.

2.2 "Drug" shall mean any controlled substance or counterfeit substance as defined in Section 4701 of Title 16 of the Delaware Code including, for example, narcotic drugs such as heroin or cocaine, amphetamines, anabolic steroids, and marijuana, and shall include any prescription substance which has been given to or prescribed for a person other than the student in whose possession it is found.

2.3 "Drug paraphernalia" shall mean all equipment, products and materials as defined in Section 4701 of Title 16 of the Delaware Code including, for example, roach clips, miniature cocaine spoons and containers for packaging drugs.

2.4 "Prescription drugs" shall mean any substance obtained directly from or pursuant to a valid prescription or order of a practitioner, as defined in 16 Del. C., Sec. 4701 (24), while acting in the course of his or her professional practice, and which is specifically intended for the student in whose possession it is found.

2.5 "Drug-like substance" shall mean any noncontrolled and/or nonprescription substance capable of producing a change in behavior or altering a state of mind or feeling, including, for example, some over-the-counter cough medicines, certain types of glue, caffeine pills.

2.6 "Nonprescription medication" shall mean any over-the-counter medication; some of these medications may be a "drug-like substance."

2.7 "Look-alike substance" shall mean any noncontrolled substance which is packaged so as to appear to

be, or about which a student makes an express or implied representation that the substance is, a drug or a noncontrolled substance capable of producing a change in behavior or altering a state of mind or feeling. See Del. C., Sec. 4752A.

2.8 "Possess," "possessing," or "possession" shall mean that a student has on the student's person, in the student's belongings, or under the student's reasonable control by placement of and knowledge of the whereabouts of, alcohol, a drug, a look-alike substance, a drug-like substance or drug paraphernalia.

2.9 "Use" shall mean that a student is reasonably known to have ingested, smoked or otherwise assimilated alcohol, a drug or a drug-like substance, or is reasonably found to be under the influence of such a substance.

2.10 "Distribute," "distributing" or "distribution" shall mean the transfer or attempted transfer of alcohol, a drug, a look-alike substance, a drug-like substance, or drug paraphernalia to any other person with or without the exchange of money or other valuable consideration.

2.11 "School environment" shall mean within or on school property, and/or at school sanctioned or supervised activities, including, for example, on school grounds, on school buses, at functions held on school grounds, at extra-curricular activities held on and off school grounds, on field trips and at functions held at the school in the evening.

2.12 "Expulsion" shall mean exclusion from school for a period determined by the local district not to exceed 180 school days. The process for readmission shall be determined by the local district. (State Board Approved January 1991, Revised August 1991)

3.0 Each school district shall have a policy on file and update it periodically. The policy shall include, as a minimum the following:

3.1 A system of notification of each student and of his/her parent at the beginning of the school year, and whenever a student enters or re-enters the school during the school year, of the state and district policies and regulations.

3.2 A statement that it is anticipated that the state and district policies shall apply to all students, except that with respect to handicapped students, the federal law will be followed, and a determination of whether the violation of the alcohol and drug policy was due to the student's handicapping condition will be made prior to any discipline or change or placement in connection with the policy.

3.3 A written policy which sets out procedures for reporting incidents, how authorities and/or parents are to be contacted, and how confidentiality is to be maintained.

3.4 A written policy on how evidence is to be kept, stored and documented, so that the chain of custody is clearly established prior to giving such evidence over to the police.

3.5 A written policy on search and seizure.

3.6 A program of intervention and assistance, which includes:

3.6.1 Having in each school building at least one person to whom staff can refer students to receive initial counseling and to obtain information on counseling/treatment services available to the student, on the student's rights, if any, to those services, and on the confidentiality which the student can expect

3.6.2 A written statement, available to be given to students or their parents, on what resources are available in the school environment and in the community for counseling and for drug and/or alcohol treatment

3.6.3 A system which ensures that all staff members are aware of resources in and referral procedures within the school environment, and encourage students to seek support and assistance

3.6.4 A system which encourages or requires that a student with alcohol or drug problems be assessed to determine the extent of alcohol or drug involvement and that the student receive the appropriate level of counseling or treatment needed

3.6.5 A policy of notification of the conditions under which the district will provide or pay for alcohol and/or drug counseling/treatment and/or testing, and the extent to which the cost of such services must be borne by the student

3.7 A discipline policy which contains, at a minimum, the following penalties for infractions of state and district drug policies.

3.7.1 Use/Impairment: For a first offense, if a student is found to be only impaired and not in violation of any other policies, he/she will be suspended for up to 10 days, or placed in an alternative school setting for up to 10 days, depending upon the degree of impairment, the nature of the substance used, and other aggravating or mitigating factors. For a second or subsequent offense, a student may be expelled or placed in an alternative school setting for the rest of the school year.

3.7.2 Possession of alcohol, a drug, a drug-like substance, and/or a look-alike substance, in an amount typical for personal use, and/or drug paraphernalia: For a first offense, the student will be suspended for 5-10 days, or placed in an alternative school setting for 5-10 days. For a second or subsequent offense, a student may be expelled for the rest of the school year.

3.7.3 Possession of a quantity of alcohol, a drug, a drug-like substance, a look-alike substance and/or drug paraphernalia in an amount which exceeds an amount typical for personal use, and/or distribution of the above named substances or paraphernalia: the student will be suspended for 10 days, or placed in an alternative school setting for 10 days. Depending on the nature of the substance, the quantity of the substance and/or other aggravating or mitigating factors, the student also may be expelled.

3.8 A policy in cases involving a drug-like substance or

a look-alike substance for establishing that the student intended to use, possess or distribute the substance as a drug.

3.9 A policy which establishes how prescription and non-prescription drugs shall be handled in the school environment and when they will be considered unauthorized and subject to these state and local policies.

3.10 A policy which sets penalties for the unauthorized possession of communication devices.

3.11 A policy which sets out the conditions for return after expulsion for alcohol or drug infractions.

3.12 Notwithstanding any of the foregoing to the contrary, all policies adopted by public school districts relating to the possession or use of drugs shall permit a student's discretionary use and possession of an asthmatic quick relief inhaler ("Inhaler") with individual prescription label; provided, nevertheless, that the student uses the inhaler pursuant to prescription or written direction from a state licensed health care practitioner; a copy of which shall be provided to the school district; and further provided that the parent(s) or legal custodian(s) of such student provide the school district with written authorization for the student to possess and use the inhaler at such student's discretion, together with a form of release satisfactory to the school district releasing the school district and its employees from any and all liability resulting or arising from the student's discretionary use and possession of the inhaler; and further provided that the school nurse may impose reasonable limitations or restrictions upon the student's use and possession of the inhaler based upon the student's age, level of maturity, behavior, or other relevant considerations.

(For students who use prescribed asthmatic quick relief inhalers, see Regulation No. 800.9 Administration of Prescription Medications)

4.0 The policy shall include the designation of a district committee composed of teachers, parents, school nurses, and community leaders. Any revisions in the local school district policy will be submitted to the Department of Education for review and approval.

## DEPARTMENT OF HEALTH AND SOCIAL SERVICES

### HEALTH CARE COMMISSION

### DELAWARE HEALTH INFORMATION NETWORK

Statutory Authority: 16 Delaware Code,  
Section 9921 (16 Del.C. 9921)

#### ORDER

In the fall of 1998, the board of directors for the Delaware Health Information Network ("DHIN") proposed to this Commission regulations for the governance and administration of the former as contemplated in 16 Del.C. §9921(e). Thereafter, the Commission caused to be published the text of the proposed regulations and a Notice of the Public Hearing in the Delaware Register of Regulations, Volume 2, Issue 9 on Monday, March 1, 1999. In addition, the Commission caused Notice of March 22, 1999 Public Hearing to be published in two newspapers of general circulation and left the record open until March 31, 1999.

The Commission appointed Judith A. Chaconas as the Hearing Officer. Ms. Chaconas reports that she received only oral and written comments in support of the proposed regulations and recommends the regulations be promulgated without change.

WHEREAS, the Commission finds that promulgation of the proposed regulations will provide guidance for the appointment of individuals to the Board, their terms of office and duties, and guidance for officers of the Board and their duties, as well as the rules of practice and procedure to be used by the Board, its committees, and workgroups;

WHEREAS, the Commission concludes that all necessary lawful requirements have been met in accordance with 29 Del.C. Ch. 101 regarding the proposed regulations; and,

WHEREAS, the text of the regulations are as follow:

**\*Please note that no changes were made to the regulation as originally proposed and published in the March 1, 1999 issue of the Register at page 1434 (2:9 Del.R. 1434). Therefore, the final regulation is not being republished. Please refer to the March 1, 1999 issue of the Register or contact the Department of Health and Social Services.**

IT IS HEREBY ORDERED this 1st day of April, 1999

That the above regulations for the governance and administration of the Delaware Health Information Network are hereby promulgated to be effective 10 days from the date published as final regulations in the Delaware Register of Regulations.

John C. Carney  
Jacquelyne W. Gorum, DSW  
Joseph A. Lieberman, MD  
Lois M. Studte, RN  
Robert F. Miller  
A. Herbert Nehrling, Jr.  
Gregg C. Sylvester, MD  
Dennis Rochford  
Donna Lee Williams

**DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES**Statutory Authority: 16 Delaware Code,  
Section 1143(e) (16 Del.C. 1143(e))

IN THE MATTER OF:

**REGULATIONS GOVERNING  
MANDATORY PRE-EMPLOYMENT  
CRIMINAL HISTORY RECORD CHECKS  
AND DRUG TESTING**

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (DHSS) initiated proceedings to promulgate Regulations in compliance with Senate Bill 13 passed in the 140<sup>th</sup> General Assembly regarding mandatory pre-employment criminal history record checks and drug testing for persons seeking to work in nursing homes or other facilities licensed under 16 Del.C. Ch. 11, either as actual employees of such facilities or as employees of a temporary agency which has referred them to the facility. DHSS's proceedings o promulgate these regulations were initiated pursuant to 16 Del.C. 1141 and 1142.

On March 1, 1999, DHSS published the proposed regulations, along with a notice of the public comment period, in the Delaware *Register of Regulations*. Written comments from the public concerning the proposed regulations were invited, to be delivered to DHSS by April 1, 1999. In addition, public hearings were held on March 23 in New Castle County and on March 25, 1999, in Kent County.

Oral and written comments were received and evaluated. The results of that evaluation are summarized below.

**SUMMARY OF THE EVIDENCE AND INFORMATION  
SUBMITTED/FINDINGS OF FACT, WITH AGENCY  
RESPONSE:**

Defining "temporary agency" to include contractors. Several commentators noted that the term "contractor" is not included in the governing law. This is in fact the case. However, the agency response is that in order to achieve the intent of the law, contractors who spend time in nursing homes on a regular basis must be covered. The similarities between contractors and "temporary agencies" are greater than the differences. As a way of achieving the intent of the law without overburdening the industry by having to cover service providers who come into a facility on an irregular basis, the definition of "temporary agency" has been revised.

Contractors are incorporated within that definition, but only if the service is provided in the nursing home for 20 hours or more a week. In order to implement this regulation properly, contractors must ensure that all staff who come into the facility are subjected to the criminal background check and drug testing, even if such staff individually do not spend the full 20 hours in the facility.

Including home health agencies within the definition of "temporary agency." Public comment was received to the effect that home health agencies are different from other types of agencies that provide staffing on an as-needed basis in nursing homes. However, the evidence submitted was not compelling. Such organizations are in effect performing as temporary agencies under these circumstances and must comply in accordance with the "temporary agency" criteria.

Including, as part of the definition of "temporary agency," service providers whose arrangements are made directly with the resident or a family member. Comments were received containing the suggestion that when a service is provided to a resident as a result of an arrangement with that person or his/her family/guardian (rather than the nursing home), the service provider should be subject to all the provisions of these regulations. The agency response is that, indeed, this suggestion does reflect sound public policy. Every person who walks through the door of a nursing home poses a potential threat to residents and should have his/her criminal background checked. However, to extend the coverage of these regulations in such a manner would require an additional public comment period. In view of the need to protect nursing home residents by issuing final regulations for this law, this kind of substantial change cannot be made at this time. The agency will take these comments into consideration and determine whether future changes to the regulations should be made. For the present, only services arranged for by the facility itself are incorporated under the definition of "temporary agency."

Burdensome reporting requirements. Numerous commentators noted that the reporting requirements in the draft regulations went beyond what was authorized in the law. That is indeed correct. To respond to this, several sections have been modified to remove those reporting requirements. However, the agency needs reports from facilities to achieve its purpose of protecting nursing home residents; thus, easy-to-use mechanisms will be established to obtain data from employers on the status of applicants who have been processed under these regulations.

Additions and modifications to the "disqualifying" crimes. Several commentators noted that there are serious crimes against the elderly and persons with disabilities which are not currently included in the list of disqualifying crimes. In addition, disqualification on the basis of a drug-related misdemeanor may be too harsh a penalty. However, adding crimes or changing the disqualifiers would force an additional public comment period. In view of the need to

protect nursing home residents by issuing final regulations for this law, no changes to the disqualifying crimes can be made at this time. The agency will take the comments submitted into account and review the need to modify the disqualifying crimes in the immediate future. Further, employers have the discretion to use criminal history information to determine employment suitability, even if a crime does not automatically disqualify an individual from working.

Timeframes for DHSS feedback to facilities. Several commentators noted that the regulations do not specify the length of time by which DHSS will provide employers with information about the State and Federal criminal history background checks. This is indeed correct. The agency response is that their experience with this whole process is so new and there are too many variables that come into play to be able to set specific time frames. However, there is a recognition on the part of the agency that completion standards need to be set for the staff who will be investigating the criminal history reports. Such standards will be developed and they will be shared with the industry, so that it is clear what the completion timeline goals are.

Staff who are "promoted." It was noted that the proposed regulations did not include a definition of "promotion." This is correct, and a definition has been added.

Comparability of crimes among states. It was questioned whether crimes committed in another state will be interpreted according to the laws of Delaware or that other state. The agency response is that, indeed, the laws of Delaware will be binding. A crime committed in another state has to be comparable to the Delaware crime in order to result in a disqualification. No change in the language of the regulation is needed regarding this matter.

The use of juvenile records. Commentators questioned how juvenile records will be used. The agency response is that the law requires employers to consider all information provided in the criminal history report. If juvenile crimes are included, and the individual had been convicted, that information will have to be used.

Drug test results being due within ten days. Commentators brought up the fact that when a positive drug test result comes in, the applicant may want the opportunity for a re-evaluation of that result. The issue is when does the "ten-day" time line begin. The agency response is that the ten-day time line would not begin until the final test result is in. Language has been modified to clarify this in the regulation.

Responsibility for paying for a "second" fingerprinting. Commentators noted that they need a reliable way to determine whether a person has already been fingerprinted, to avoid having to pay for a second one. The agency response is that every effort will be made to help employers make that determination. Unfortunately, no fool proof

method currently exists because the State Police does not have any way to check, when a person comes in for fingerprinting, whether it has already been done in compliance with this law.

Collecting payment for "second" fingerprintings. The draft regulations specified that the State Police would be the agency responsible for collecting from employers if an applicant is fingerprinted more than once during any five-year period. It has been determined that DHSS will assume this responsibility, and the regulations have been modified to reflect that.

Criminal history information to be provided by temporary agencies to nursing homes. Commentators stated that, in their view, the draft regulations erroneously *require* temporary agencies to provide full criminal history information to nursing homes. The agency response is that, in fact, this is not an erroneous interpretation of the law. The law states that no nursing home may hire any applicant without obtaining a report of the person's entire criminal history record from the State Police and a report from DHSS regarding its review of the person's FBI report. Language in the law makes it clear that persons referred by a temporary agency to a nursing home are "applicants." Thus, no nursing home can "hire" temporary staff without first obtaining a report of the person(s)'s entire criminal history record (State and Federal). Such information has to come from the temporary agency, who is the employer. This analysis is compelling, and the requirement as included in the draft regulations will remain in the final version.

Confidentiality of information. The draft regulations did not make clear the confidentiality responsibilities imposed on employers in the handling of criminal history information. New sections have been added at the end of the regulations to clarify what those responsibilities are. These are not new responsibilities; rather, they are clarifications of existing requirements, as mandated by the Delaware Code.

How to handle current employees of a facility who seek promotion and are found to have a disqualifying crime in their criminal history. This matter is not addressed in the regulations, as it is a matter of law. Any such employee would not be able to accept the promotion. However, the handling of his/her employment in the current position is something that each facility must determine in consultation with its own legal counsel.

Temporary agencies having to pay for criminal background checks. Commentators stated that there is an inequity in the fact that nursing homes and similar facilities do not have to pay for the criminal background checks, while temporary agencies do. Indeed, this is correct. The agency response is that the requirement is specifically included in the law and cannot be changed via regulation.

Terminating applicants if drug test is not completed within two months. It was suggested that perhaps such employees should be allowed to take a leave of absence.

However, the law is specific in requiring that they be terminated under such circumstances.

Allowing applicants to begin work before drug test results have been received. It was recommended that drug test results be required *prior* to the start of employment. However, the law specifically allows applicants to begin conditional employment before the results have been received.

Paying Unemployment Compensation to applicants terminated for a disqualifying crime. Commentators expressed concern that applicants who are disqualified might be found eligible for Unemployment Compensation. The law does not address this issue. The agency response is that consultation will take place with the Department of Labor to determine what the issues are involving Unemployment Compensation and how the matter can be resolved.

DECISION/ORDER:

The Department finds that the changes made in response to the comments received during the public comment period do not substantially change the nature of the regulations. Rather, they help to clarify the regulations proposed, improve procedures and reduce the burden on employers. Thus, the regulations, as set forth in the attached revision, should be issued, in the best interest of the general public of the State of Delaware.

THEREFORE, IT IS ORDERED, that the Regulations governing MANDATORY PRE-EMPLOYMENT CRIMINAL HISTORY RECORD CHECKS AND DRUG TESTING are adopted, as herein revised, and shall become effective ten days after publication of the final regulations in the Delaware *Register of Regulations*.

April 15, 1999

GREGG C. SYLVESTER, MD  
SECRETARY

~~Draft~~  
Final

DELAWARE HEALTH AND SOCIAL SERVICES  
PROPOSED REGULATIONS FOR CRIMINAL HISTORY  
RECORD CHECKS AND DRUG TESTING

Title 16 Del.C. Sections 1141 and 1142

STATE OF DELAWARE  
DELAWARE HEALTH AND SOCIAL SERVICES

PROPOSED REGULATIONS FOR CRIMINAL HISTORY  
RECORD CHECKS AND PRE-EMPLOYMENT DRUG  
TESTING FOR PERSONS WORKING IN NURSING

HOMES AND OTHER FACILITIES LICENSED UNDER  
16 Del. C. Ch. 11.

LEGAL BASIS

1. The legal base for these regulations is in the Delaware Code, Title 16, Chapter 11, Sections 1141 and 1142.

PURPOSE

2. The overall purpose of these regulations is to ensure the safety and well-being of residents of facilities licensed pursuant to 16 Del. C. Ch. 11. To this end, persons selected for employment in these facilities, effective March 31, 1999, will be subject to pre-employment criminal history checks and pre-employment drug testing. Further, these regulations apply to any person referred by a temporary agency, as herein defined, to such facilities for temporary employment who was hired by such agency on or after March 31, 1999.

DEFINITIONS

3. "Nursing home" means a residential facility that provides shelter and food to more than one person who, because of their physical and/or mental condition, require a level of care and services suitable to their needs to contribute to their health, comfort, and welfare; and who are not related within the second degree of consanguinity to the controlling person or persons of the facility. The facilities covered here are those licensed pursuant to 16 Del. C. Ch. 11, and include but are not limited to nursing facilities (commonly referred to as nursing homes); assisted living facilities; intermediate care facilities for persons with mental retardation; neighborhood group homes; family care homes; and rest residential facilities.

4. "Applicant" means any person seeking employment in a nursing home; a current employee of such facility who seeks promotion within the same facility; and/or a person hired on or after March 31, 1999, by a temporary agency (as defined below and including, but not limited to, contractors and home health agencies) who is sent by that agency to work in a nursing home.

~~5. "Contractor or Temporary Agency" means any person or organization that provides services to a nursing home where the work responsibilities are located in the facility on a regular or intermittent basis and where the nursing home's need for the service is ongoing (i.e., whether or not the specific person performs the service regularly or intermittently, the nursing home will need to ensure that those services are provided). This includes, but is not limited to, such services as housekeeping, food service, security, physicians,~~

~~beauticians, and therapists. It does not include companies or vendors working on the physical structures, systems or grounds of nursing homes on a temporary, as needed, basis. For the purposes of these regulations, contractors are included in the definition of temporary agencies and are therefore subject to the same requirements as temporary agencies.]~~

[6. 5.]“Conditional Employment” is the period of time during which an applicant is working in a nursing home while his/her employer has not received the results of (a) the State criminal history record, (b) the Federal criminal history record, and (c) the drug test.[Conditional employment must end immediately if either the State or Federal criminal history record contains disqualifying crime(s).]

[7. 6.]“Department or DHSS” means Delaware Health & Social Services.

[8. 7.]“Disqualifying convictions or disqualifying crimes” are the items delineated in Section 17 of these regulations.

[9. 8.]“Employer” is any person, business entity, management company, temporary agency, or other organization that hires persons to work in a nursing home or that places persons for work in a nursing home.

[10. 9.]“Evidence” means verification from the State Bureau of Identification or designee that the applicant has been fingerprinted and that his/her criminal history records have been requested. In addition, evidence means documentation that drug testing has been performed.

[11. 10.]“Final Employment” is contingent upon the employer’s receipt of the State Bureau of Identification criminal history record containing evidence of no disqualifying crimes or of any factors which would render that applicant unsuitable for employment in a nursing home; a report by the Department that there are no disqualifying crimes in such person’s Federal criminal record; and the results of the drug testing.

[12. 11.] To“hire” means to begin employment of an applicant after March 31, 1999, or to pay wages for the services of a person who has not worked for the employer during the preceding twelve-month period.

[13. 12.]“Illegal drug” means: marijuana/cannabis; cocaine; opiates including heroin; phencyclidine (PCP); amphetamines; and any other illegal drug subsequently specified by the Department in the absence of a valid physician prescription.

[13. “Promotion” means any change in job classification which results in additional responsibility and/or an

increase in wages. It does not include a change in job status from parttime to fulltime.]

~~[14. “Temporary agency or contractor” means any business organization or person that places persons with another business organization to perform services. As used in these regulations, a temporary agency includes home health agencies which make such placements and contractors.]~~

[14. “Temporary agency” for purposes of these regulations means any organization, employer, business entity, contractor, or home health agency that provides services in a nursing home. In the case of contractors, services are covered if they are provided on a regular basis. “Regular basis” for purposes of this definition means that the services are provided for 20 hours or more per week. Companies, contractors, and/or vendors working on the physical structures, systems or grounds of nursing homes on an as-needed basis are not included within this definition or these regulations.]

#### PERSONS SUBJECT TO THE LAW

15. All applicants hired on or after March 31, 1999, and all current employees who seek promotion in a nursing home are subject to the provisions of 16 Del.C. 1141 and 1142. In addition, all persons hired on or after March 31, 1999, by a temporary agency (as defined herein) and ~~placed referred~~ on or after March 31, 1999, ~~at to~~ a nursing home are subject to the provisions of 16 Del.C. 1141 and 1142.

#### FREQUENCY OF CRIMINAL HISTORY RECORD CHECKS

16. Any applicant who has been the subject of a qualifying background check in Delaware within the previous 5 years shall be exempt from 16 Del.C. ~~[Section]~~ 1141, except that the applicant is not exempt from subsequent employer access to the information contained in that background check. To qualify, such a check must include both State and Federal criminal history record checks and be pursuant to 16 Del.C. ~~[Section]~~ 1141. However, employers, at their own expense, shall have the right to require more frequent background checks.

#### CRITERIA FOR UNSUITABILITY FOR EMPLOYMENT

17. The following types of criminal convictions (or such crimes, if committed in another jurisdiction, which are comparable under Delaware law) automatically disqualify a person from working in a nursing home, if the person was convicted of the offense within the time parameters specified:

~~[• Any felony, if convicted within the last five years.]~~

• Those Class A misdemeanors included in Title 11, Chapter 5, Subchapter II, Subpart A, of the Delaware Code, if convicted within the last five years.

• Any misdemeanor ~~[in Delaware]~~ involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in Chapter 47 of Title 16 of the Delaware Code, ~~[or conviction of a crime in any state or local jurisdiction, any Federal or military reservation or the District of Columbia, or any foreign jurisdiction that would be equivalent to such a misdemeanor in Delaware,]~~ if convicted within the last five years.

• Any felony ~~[in Delaware]~~ involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in Chapter 47 of Title 16 of the Delaware Code, ~~[or conviction of a crime in any state or local jurisdiction, any Federal or military reservation or the District of Columbia, or any foreign jurisdiction that would be equivalent to such a felony in Delaware,]~~ if convicted within the last ten years.

• Any violent felony, as specified in Title 11 Del. C. Section 4201 (c), if convicted within the last ten years.

• Conviction of any act causing death (as defined in Title 11, Chapter 5, Subchapter II, Subpart B, of the Delaware Code, with no time limit.

• Conviction of any sexual offense designated as a felony in Title 11, Chapter 5, Subchapter II, Subpart D of the Delaware Code, with no time limit.

**[• Any felony, other than those specified above, if convicted within the last five years.]**

18. In regard to other criminal convictions, the following criteria are to be used in determining whether a person is suitable for employment in a nursing home:

- A. Type of offense(s)
- B. Frequency of offense(s)
- C. Length of time since the offense(s)
- D. Age at the time of the offense(s)
- E. Severity of the offense(s)
- F. Record since the offense(s)
- G. Nature of the offense(s) in relation to the type of job assignment
- H. Disposition of the offense(s).

SANCTIONS

19. Sanctions against applicants shall be applied and enforced in the following circumstance(s):

A. Failure by an applicant to disclose relevant criminal history information on a *criminal history record request form* that is subsequently disclosed as a result of the criminal history record check shall result in a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

B. Failure of an applicant to comply with pre-

employment drug testing, as required, shall result in a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

~~[C. Violations will be reported by the employer to the Division of Long Term Care Residents Protection.]~~

20. Sanctions against employers shall be applied and enforced in the following circumstance(s):

A. An employer who hires an applicant conditionally before receiving verification that the applicant has been fingerprinted and that the State and Federal criminal history record checks have been requested shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

B. An employer who hires an applicant for final employment and fails to request and/or fails to obtain a report of the person's entire criminal history record from the State Bureau of Identification shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

C. An employer who hires an applicant for final employment and fails to request and/or fails to obtain a written report regarding suitability of the applicant based on his or her Federal criminal history shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

D. Employer failure to comply with the pre-employment drug testing law shall result in a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

**[E. Violations are to be reported to the Division of Long Term Care Residents Protection.]**

EMPLOYER RESPONSIBILITIES

21. Criminal history record checks and drug testing are to be completed on applicants who have been prescreened and to whom an offer of employment may be made. Payment for drug testing is the responsibility of the employer or the applicant.

22. Conditional employment cannot begin until the employer has received evidence that the applicant's State and Federal criminal history records have been requested, he/she has been fingerprinted, and he/she has requested the appropriate drug testing. Under no circumstances shall an applicant be employed on a conditional basis for more than 2 months if the drug test results have not been received by his/her employer.

23. An employer whose nursing home includes both licensed and unlicensed areas must ensure that all persons who perform services in the licensed areas comply with the law.

24. The employer shall ensure that every application for

employment at a nursing home specifies that the applicant is required to provide any and all information necessary to obtain a report of the person's entire criminal history record from the State Bureau of Identification and a report of the person's entire Federal criminal history record pursuant to the Federal Bureau of Investigations appropriation of Title II of Public Law 92-544. In addition, every application for employment shall contain a statement that must be signed by the applicant in which the applicant grants full release for the employer to request and obtain any such records or information contained on a criminal history record.

25. The employer shall ensure that a *criminal history record request form* has been completed and that the employer copy is maintained in its files.

26. The employer shall also maintain a signed copy of a *verification of providing fingerprints to the Delaware State Police form*.

27. When exigent circumstances exist, and an employer must fill a position in order to maintain the required level of service, the employer may hire an applicant on a conditional basis when the employer receives evidence that the applicant has actually had the appropriate drug testing, as long as the person has also provided verification of fingerprinting. All persons hired shall be informed in writing and shall acknowledge, in writing, that his/her drug test results have been requested.

28. The employer must ensure that no applicant remains employed in conditional status for more than two months without receiving the results of the mandatory drug testing. If the drug testing results are not received within two months, the applicant must be terminated from employment, or in the case of an applicant **[who was conditionally seeking] promot [ed ion], the applicant [can must] be [returned to his/her prior position demoted]** or removed from employment in the nursing home.

29. The employer must provide to the Department a copy of each applicant's **[final mandatory]** drug test results within 10 business days of their receipt. **[Along with the results, or as soon thereafter as the decision is made, the employer shall notify the Department as to whether the applicant shall remain employed.]**

30. When the employer is notified of conviction of one or more disqualifying crimes in either the State or Federal criminal history of an applicant, the employer shall terminate the applicant **[immediately. A copy of or documentation of the termination notification shall be sent to the Department and a copy maintained in the facility's files.]**

31. If an employer wishes to have a criminal history record check conducted on an applicant who has been the subject of a qualifying State and Federal background check within the previous 5 years, the cost for this must be borne by the employer. Payment must be made directly to the State Police. The Department will, at no cost, provide the results of the Federal Bureau of Investigation information, just as it would for an applicant who had not had such a check conducted within the previous 5 years.

32. If a person is fingerprinted under the auspices of these regulations more than once during a five-year period, the cost of that fingerprinting will not be borne by the State. **[The potential employer is required to confirm with DHSS that the applicant has been previously fingerprinted.]** If billed, the Department will **[return such invoices to the State Police so that they can]** obtain payment from the employer specified on the *criminal history record request form*. Such employer may obtain payment from the applicant.

33. The employer will notify the Department if an applicant is separated from employment for any reason prior to completion of the criminal history check process.

34. The employer will have the responsibility for using the results of the criminal history record check and the drug testing as factors in making the determination of suitability for final employment, unless the State and/or Federal criminal history record check identifies the presence of a conviction of one or more disqualifying crimes, in which case the applicant is automatically disqualified for final employment and must be terminated.

35. The employer will notify the applicant of the findings.

**[36. The Department reserves the right to obtain data from employers on the employment status of applicants covered under these regulations.]**

**[36. The employer will notify the Department of the names of all persons who were offered and accepted conditional and final employment.]**

**[37. It is recommended that employers require that all new employees after March 31, 1999, notify them of any subsequent convictions. Subsequent convictions may impact the suitability of employment of the employee, as determined by the employer.]**

#### RESPONSIBILITIES OF TEMPORARY AGENCIES

**[38.][37.]** As employers, temporary agencies are responsible for all items delineated above under the section titled

“EMPLOYER RESPONSIBILITIES” (sections 21-37).

~~[39-]~~[38.] In addition, temporary agencies are responsible for the cost of criminal history record checks.

**[39. In the case of contractors covered by these regulations, all applicants who provide services in a nursing home as an employee of a contractor must comply with the requirements of 16 Del.C.1141 and 1142. Thus, each individual – even though he/she may not work in the nursing home for 20 hours in any given week – must comply, if the contractor is providing services in the nursing home for 20 hours or more per week. ]**

40. ~~[Also,] [† T]~~ temporary agencies are required to inform nursing homes of any criminal background identified in the criminal history information provided by the State Bureau of Identification and the Federal report, as summarized by the Department, regarding any **[applicant person]** placed or referred for work at such facility. The temporary agency must have each applicant sign a full release giving the agency permission to provide any such criminal history information received about him/her to any nursing home where the person is placed to work.

41. Temporary agencies are required to inform nursing homes of the mandatory drug test results of **[applicants persons placed or]** referred for work in such facilities. Applicants shall sign a full release giving the agency permission to provide any such information to any nursing home where they are placed to work.

APPLICANTS’ RESPONSIBILITIES

42. Applicants are responsible for completing all information accurately and completely on a *criminal history record request form*; a *verification of providing fingerprints to the Delaware State Police form*; and any form provided by the employer for use in obtaining mandatory pre-employment drug testing. Any applicant who refuses to complete any one or more of these forms is deemed to have voluntarily withdrawn his/her application.

43. The applicant is responsible for having his/her fingerprints taken and returning a *verification of providing fingerprints to the Delaware State Police form* to the employer.

44. The applicant is responsible for informing any potential employer if he/she has already been fingerprinted under the jurisdiction of these regulations. ~~[The potential employer is required to confirm with DHSS that the applicant has been previously fingerprinted.]~~ The cost for additional fingerprinting, done above and beyond the one

fingerprinting per five-year period required by these regulations, shall not be borne by the State.

45. The applicant is responsible for completing the required drug testing and providing verification to the employer.

THE DEPARTMENT’S RESPONSIBILITIES

46. The Department is responsible for promulgating these regulations and revising them, as the need may arise.

47. Since an applicant’s Federal criminal record may not be provided to a privately-owned entity or to the applicant, the Department will issue a report to the employer based upon the information received.

48. Once the Department has received all necessary documentation, it shall perform a review, guided by criteria and timelines developed by the Department, and issue a written summary of findings to the employer. If conviction of a disqualifying crime is included on the State or Federal criminal history report, the Department will **[immediately]** notify the employer **[immediately]**, prohibiting either the hire or continued conditional employment of the applicant.

CONFIDENTIALITY

Title 11, subsection 8513 (c) (1) of the Delaware Code permits the State Bureau of Identification to "furnish information pertaining to the identification and conviction data of any person...of whom the Bureau has record...to ...[i]ndividuals and agencies for the purpose of employment of the person whose record is sought, provided...[t]he use of the conviction data shall be limited to the purpose for which it was given..."

49. The Department shall store written and electronically-recorded criminal history record information in a secure manner, to provide for the confidentiality of records and to protect against any possible threats to their security and integrity.

50. The Department shall limit the use of the criminal history record information to its purpose of determining suitability for employment.

51. The Department shall not release to employers, as defined in these regulations, copies of actual written reports of criminal history records prepared by the Federal Bureau of Investigation.

52. The following procedure shall be established to permit the review of criminal history record files by the applicant:

A. An applicant shall submit a request in writing to the

Department for the on-site review of his/her criminal history record file.

B. An appointment shall be made for the applicant to review the record at the Department. Photo identification will be required at the time of the review.

C. The record shall be reviewed in the presence of a Department employee.

D. Written documentation of the date and time of the review and the name of those present shall be filed in the criminal history record file for the applicant.

E. The Department shall not remove criminal history records (written and electronic) from the secure files for any purpose other than to permit review by the named applicant.

53. Criminal history record information shall not be disseminated to any persons other than the applicant, his/her employer or subsequent employer(s), nursing homes to which a person is [referred placed] by a temporary agency, or the Department (11 Del. C. Section 513(d)).

**[54 All employers are required to store criminal history record information in a secure manner, to provide for the confidentiality of records and to protect against any possible threats to their security and integrity. Employers are reminded that the confidentiality of such information is required under 11 Del.C.8514. Knowing and reckless violation is a Class A Misdemeanor.**

**55. Employers must limit the use of the criminal history record information to its purpose of determining suitability for employment.]**

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#### DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code, Section  
107 (31 Del.C. 107)

IN THE MATTER OF:

REVISION OF THE REGULATIONS  
OF THE MEDICAID/MEDICAL  
ASSISTANCE PROGRAM

NATURE OF THE PROCEEDINGS:

The Delaware Department of Health and Social Services ("Department") initiated proceedings to update policies related durable medical equipment and general policies. The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section

10115 in the March 1999 Delaware Register of Regulations, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by April 1999, at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

No written or verbal comments were received relating to this proposed rule.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the March 1999 Register of Regulations should be adopted as written.

THEREFORE, IT IS ORDERED, that the proposed regulations of the Medicaid/Medical Assistance Program are adopted and shall be final effective May 10, 1999.

4/12/99

Gregg C. Sylvester, M.D., Secretary

**\*Please note that no changes were made to the regulation as originally proposed and published in the March 1, 1999 issue of the Register at page 1445 (2:9 Del.R. 1445). Therefore, the final regulation is not being republished. Please refer to the March 1, 1999 issue of the Register or contact the Department of Health and Social Services.**

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#### DIVISION OF PUBLIC HEALTH OFFICE OF VITAL STATISTICS

Statutory Authority: 16 Delaware Code,  
Section 3102 (16 Del.C. 3102)

BEFORE DELAWARE HEALTH  
AND SOCIAL SERVICES  
IN THE MATTER OF:  
VITAL STATISTICS REGULATIONS

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (DHSS) initiated proceedings to establish regulations for the Vital Statistics Code, Title 16, Del. Code, Chapter 31.

DHSS published in the Delaware Register of Regulations, February, 1, 1999, Volume 2, Issue 8 (pages 1351-1358), its proposed regulations for the Vital Statistics Code. It requested verbal testimony from the public at a hearing held on March 15, 1999, as well as written comments to be delivered no later than March 19, 1999, at which time the Department would review the information, factual evidence and public comment to the proposed regulations.

There was not any verbal testimony at the public hearing nor were any written comments received from any individual or group by the March 19, 1999, deadline.

FINDINGS OF FACT:

The Department finds that the proposed regulations, as published on February 1, 1999, should be issued as final - in the best interest of the general public of the State of Delaware. No changes have been made to those regulations as published on that date.

THEREFORE, IT IS ORDERED that the regulations for the Vital Statistics Code, as published on February 1, 1999, are adopted and shall become effective ten days after publication of this notice in the Delaware Register of Regulations

March 31, 1999

GREGG C. SYLVESTER, MD, Secretary

**\*Please note that no changes were made to the regulation as originally proposed and published in the February 1, 1999 issue of the Register at page 1351 (2:8 Del.R. 1351). Therefore, the final regulation is not being republished. Please refer to the February 1, 1999 issue of the Register or contact the Department of Health and Social Services.**

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**DEPARTMENT OF INSURANCE**

Statutory Authority: 18 Delaware Code,  
Section 314, 2503 (18 Del.C. 314, 2503)

In the Matter of: |  
The Amendment of Insurance | Docket Number: 99-12  
Department Regulation No. 41. |

**FINAL ORDER**

COMES NOW, the Insurance Commissioner of the State of Delaware and Orders in conformance with the Proposed Order and Recommendation of the Hearing Officer as follows:

WHEREAS, I have considered the Proposed Order and Recommendation submitted by the Hearing Officer, as well as the entire record of this matter; and

WHEREAS, I adopt the Proposed Order and Recommendation and incorporate the summary of evidence, the proposed findings of fact, and the recommendation of the Hearing Officer by this reference.

NOW THEREFORE, I Order that Regulation No. 41 be amended as referenced herein, effective May 21, 1999.

SO ORDERED this 15th day of April, 1999.

DONNA LEE WILLIAMS  
Insurance Commissioner State of Delaware

**PROPOSED ORDER AND RECOMMENDATION**

On March 1, 1999, proposed revisions to Regulation 41 were published in the Register of Regulations in accordance with 29 *Del C.* chapters 11 and 101 and notices of the public hearing to consider such revisions were published in two local newspapers, see Exhibit "1" attached hereto. Also in accordance with 29 *Del C.* chapters 11 and 101, a public hearing was held on March 23, 1999 before the below-signed hearing officer. The record was held open until April 2, 1999, allowing for the submission of supplemental exhibits by interested parties. A list of hearing attendees is attached hereto as Exhibit "2".

The following is the Hearing Officer's Proposed Order and Recommendation in the above-captioned matter.

I. Summary of the Evidence

The evidence in this matter consists of the following:

1. The testimony of Lisbeth Miller, Insurance Department Insurance Research Senior Analyst who reported the position of Department with regard to the proposed revisions of Reg.41 attached hereto as Exhibit "5". Ms. Miller recommended that numerous technical revisions be made to comply with recent changes in federal law. An account of such revisions is reflected in Exhibit "6" attached hereto. She testified that the Hearing Officer should consider to what extent the provisions of §12E should remain in place given that the consumers protections described therein expired on March 4, 1999. Also, Ms. Miller testified that numerous revisions not previously proposed be adopted as follows:

a. Insert at §8B(5) immediately after the beginning parenthesis appearing in the first line thereof the phrase "or in the case of hospital outpatient department services, under the prospective payment system the co-payment amount" to more fully comply with applicable provisions of federal law;

b. Insert the word "of" in the title of §9E to read *Make-up of Benefit Plans*;

c. Add to the end of §11A. the phrase ", or eligibility for a group Medicare supplement plan."; and

d. At line 1., §11C substitute the phrase "the above subsections A and B" for the phrase "subsection A" as it appears therein.

2. The testimony of Jack Schrepplar of the Bayard Firm in favor of striking the provisions of §12 E particularly with respect to its mandate that Plans A, B, C, and F be offered in this jurisdiction. A further expression of such

view is contained in his January 22, 1999 letter to the Department, marked as Exhibit "4" hereto.

3. The testimony of Jonathan Neipris of Blue Cross Blue Shield of Delaware in favor of striking the language proposed by the Department appearing at the end of §11 prohibiting use of the availability of a group Medicare Supplement policy as a basis for denying open enrollment.

4. The testimony of Jay Moriello in generally in favor of the proposed revisions to Reg. 41, particularly with regard to the amendment to the open enrollment provisions at § 11.

## II. Findings of Fact and Conclusions of Law

Based on the evidence received in this matter, I find that:

A. The technical revisions and consumer protections reflected in Exhibit "5" are justified and should be incorporated in Insurance Department Regulation 41.

B. §12 E. should be struck in its entirety as the consumer protections provided thereby apply to a class to which no individual may be added following March 4, 1999.

C. Notwithstanding the above, the §12 E requirement that carriers file and make available for sale plans A, B, C and F should be retained as a revision to §11 A. Such revision ensures that in the event of future involuntary terminations as contemplated in the revised provisions of §12, plans A, B, C and F will be readily available to meet demand. Secondly, such a provision protects the class of "eligible individuals of 1999" from finding themselves members of closed blocks of business.

## III. Recommendation

For the above reasons it is recommended that Insurance Department Regulation No. 41 be amended in the form attached hereto as Exhibit "5".

SO RECOMMENDED, this 10<sup>th</sup> day of April, 1999.

Fred A. Townsend III, Hearing Officer

### REGULATION 41

#### MEDICARE SUPPLEMENT INSURANCE MINIMUM STANDARDS

January 1, 1992

Amended Effective April 9, 1992

Amended Effective April 1, 1996

Amended Effective November 20, 1998

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Appendix BForm for Reporting Duplicate Policies

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## Section 1.Purpose

The purpose of this regulation is to provide for the reasonable standardization of coverage and simplification of terms and benefits of Medicare supplement policies or contracts; to facilitate public understanding and comparison of such policies; to eliminate provisions contained in such policies which may be misleading or confusing in connection with the purchase of such policies or with the settlement of claims; and to provide for full disclosures in the sale of accident and sickness insurance coverages to persons eligible for Medicare.

## Section 2.Authority

This regulation is issued pursuant to the authority vested in the Commissioner under Title 18, Delaware Code, Sections 314 and 3403.

**Section 3. Applicability and Scope**

A. Except as otherwise specifically provided in Sections 7, 12, 13, 16 and 21, this regulation shall apply to:

(1) All Medicare supplement policies delivered or issued for delivery in this State on or after the effective date of this regulation, and

(2) All certificates issued under group Medicare supplement policies which certificates have been delivered or issued for delivery in this State.

B. This regulation shall not apply to a policy or contract of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or a combination thereof, or for members or former members, or a combination thereof, of the labor organizations.

**Section 4. Definitions**

For purposes of this regulation:

A. "Applicant" means:

(1) In the case of an individual Medicare supplement policy, the person who seeks to contract for insurance benefits, and

(2) In the case of a group Medicare supplement policy, the proposed certificateholder.

B. "Bankruptcy" means when a Medicare+Choice organization that is not an issuer has filed, or has had filed against it, a petition for declaration of bankruptcy and has ceased doing business in the state.

C. "Certificate" means any certificate delivered or issued for delivery in this state under a group Medicare supplement policy.

D. "Certificate Form" means the form on which the certificate is delivered or issued for delivery by the issuer.

E. "Continuous period of creditable coverage" means the period during which an individual was covered by creditable coverage, if during the period of the coverage the individual had no breaks in coverage greater than sixty-three (63) days.

F. (1) "Creditable coverage" means, with respect to an individual, coverage of the individual provided under any of the following:

- (a) A group health plan;
- (b) Health insurance coverage;
- (c) Part A or Part B of Title XVIII of the Social Security Act (Medicare);

(d) Title XIX of the Social Security Act (Medicaid), other than coverage consisting solely of benefits under section 1928;

(e) Chapter 55 of Title 10 United States Code (CHAMPUS)

(f) A medical care program of the Indian

Health Service or of a tribal organization;

(g) A State health benefits risk pool;

(h) A health plan offered under Chapter 89 of Title 5 United States Code (Federal Employees Health Benefits Program);

(i) A public health plan as defined in federal regulation; and

(j) A health benefit plan under Section 5(e) of the Peace Corps Act (22 United States Code 2504(e)).

(2) "Creditable coverage" shall not include one or more, or any combination of, the following:

(a) Coverage only for accident or disability income insurance, or any combination thereof;

(b) Coverage issued as a supplement to liability insurance;

(c) Liability insurance, including general liability insurance and automobile liability insurance;

(d) Workers' compensation or similar insurance;

(e) Automobile medical payment insurance;

(f) Credit-only insurance;

(g) Coverage for on-site medical clinics; and

(h) Other similar insurance coverage, specified in federal regulations, under which benefits for medical care are secondary or incidental to other insurance benefits.

(3) "Creditable coverage" shall not include the following benefits if they are provided under a separate policy, certificate, or contract of insurance or are otherwise not an integral part of the plan:

(a) Limited scope dental or vision benefits;

(b) Benefits for long-term care, nursing home care, home health care, community-based care, or any combination thereof; and

(c) Such other similar, limited benefits as are specified in federal regulations.

(4) "Creditable coverage" shall not include the following benefits if offered as independent, noncoordinated benefits:

(a) Coverage only for a specified disease or illness; and

(b) Hospital indemnity or other fixed indemnity insurance.

(5) "Creditable coverage" shall not include the following if it is offered as a separate policy, certificate of contract of insurance:

(a) Medicare supplemental health insurance as defined under Section 1882(g)(1) of the Social Security Act;

(b) Coverage supplemental to the coverage provided under Chapter 55 of Title 10, United States Code; and

(c) Similar supplemental coverage provided to coverage under a group health plan.

G. "Employee welfare benefit plan" means a plan, fund or program of employee benefits as defined in 29 U.S.C. Section 1002 (Employee Retirement Income Security Act).

H. "Insolvency" means when an issuer, licensed to transact the business of insurance in this state, has had a final order of liquidation entered against it with a finding of insolvency by a court of competent jurisdiction in the issuer's state of domicile.

I. "Issuer" includes insurance companies, fraternal benefit societies, health care service plans, health maintenance organizations, and any other entity delivering or issuing for delivery in this state Medicare supplement policies or certificates.

J. "Medicare" means the "Health Insurance for the Aged Act," Title XVIII of the Social Security Amendments of 1965, as then constituted or later amended.

K. "Medicare+Choice plan" means a plan of coverage for health benefits under Medicare Part C as defined in [refer to definition of Medicare+Choice plan in Section 1859 found in Title IV, Subtitle A, Chapter 1 of P.L. 105-33], and includes:

(1) Coordinated care plans which provide health care services, including but not limited to health maintenance organization plans (with or without a point-of-service option), plans offered by provider-sponsored organizations, and preferred provider organization plans;

(2) Medical savings account plans coupled with a contribution into a Medicare+Choice medical savings account; and

(3) Medicare+Choice private fee-for-service plans.

L. "Medicare Supplement Policy" means a group or individual policy of accident and sickness insurance or a subscriber contract other than a policy issued pursuant to a contract of hospital and medical service associations or health maintenance organizations, under Section 1876 or Section 1833 of the Federal Social Security Act (42 U.S.C. Section 1395 et seq.) or an issued policy under a demonstration project specified in 42 U.S.C. § 1395ss(g)(1), which is advertised, marketed or designed primarily as a supplement to reimbursements under Medicare for the hospital, medical or surgical expenses of persons eligible for Medicare.

M. "Policy Form" means the form on which the policy is delivered or issued for delivery by the issuer.

N. "Secretary" means the Secretary of the United States Department of Health and Human Services.

#### Section 5. Policy Definitions and Terms

No policy or certificate may be advertised, solicited or issued for delivery in this state as a Medicare supplement policy or certificate unless such policy or certificate contains definitions or terms which confirm to the requirements of

this section.

A. "Accident," "Accidental Injury," or "Accidental Means" shall be defined to employ "result" language and shall not include words which establish an accidental means test or use words such as "external, violent, visible wounds" or similar words of description or characterization.

(1) The definition shall not be more restrictive than the following: "Injury or injuries for which benefits are provided means accidental bodily injury sustained by the insured person which is the direct result of an accident, independent of disease or bodily infirmity or any other cause, and occurs while insurance coverage is in force."

(2) The definition may provide that injuries shall not include injuries for which benefits are provided or available under any workers' compensation, employer's liability or similar law, or motor vehicle no-fault plan, unless prohibited by law.

B. "Benefit Period" or "Medicare Benefit Period" shall not be defined more restrictively than as defined in the Medicare program.

C. "Convalescent Nursing Home," "Extended Care Facility," or "Skilled Nursing Facility" shall not be defined more restrictively than as defined in the Medicare program.

D. "Health Care Expenses" means expenses of health maintenance organizations associated with the delivery of health care services, which expenses are analogous to incurred losses of insurers.

Expenses shall not include:

- (1) Home office and overhead costs;
- (2) Advertising costs;
- (3) Commissions and other acquisition costs;
- (4) Taxes;
- (5) Capital costs;
- (6) Administrative costs; and
- (7) Claims processing costs.

E. "Hospital" may be defined in relation to its status, facilities and available services or to reflect its accreditation by the Joint Commission on Accreditation of Hospitals, but not more restrictively than as defined in the Medicare program.

F. "Medicare" shall be defined in the policy and certificate. Medicare may be substantially defined as "The Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965 as Then Constituted or Later Amended," or "Title I, Part I of Public Law 89-97, as Enacted by the Eighty-Ninth Congress of the United States of America and popularly known as the Health Insurance for the Aged Act, as then constituted and any later amendments or substitutes thereof," or words of similar import.

G. "Medicare Eligible Expenses" shall mean expenses of the kinds covered by Medicare, to the extent recognized as reasonable and medically necessary by Medicare.

H. "Physician" shall not be defined more restrictively than as defined in the Medicare program.

I. "Sickness" shall not be defined to be more restrictive than the following:

"Sickness means illness or disease of an insured person which first manifests itself after the effective date of insurance and while the insurance is in force."

The definition may be further modified to exclude sicknesses or diseases for which benefits are provided under any workers' compensation, occupational disease, employer's liability or similar law.

#### Section 6. Policy Provisions

A. Except for permitted preexisting condition clauses as described in Section 7A(1) and Section 8A(1) of this Regulation, no policy or certificate may be advertised, solicited or issued for delivery in this state as a Medicare supplement policy if the policy or certificate contains limitations or exclusions on coverage that are more restrictive than those of Medicare.

B. No Medicare supplement policy or certificate may use waivers to exclude, limit or reduce coverage or benefits for specifically named or described preexisting diseases or physical conditions.

C. No Medicare supplement policy or certificate in force in the State shall contain benefits which duplicate benefits provided by Medicare.

#### Section 7. Minimum Benefit Standards for Policies or Certificates Issued for Delivery Prior to January 1, 1992

No policy or certificate may be advertised, solicited or issued for delivery in this State as a Medicare supplement policy or certificate unless it meets or exceeds the following minimum standards. These are minimum standards and do not preclude the inclusion of other provisions or benefits which are not inconsistent with these standards.

##### A. General Standards.

The following standards apply to Medicare supplement policies and certificates and are in addition to all other requirements of this regulation.

(1) A Medicare supplement policy or certificate shall not exclude or limit benefits for losses incurred more than six (6) months from the effective date of coverage because it involved a preexisting condition. The policy or certificate shall not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six (6) months before the effective date of coverage.

(2) A Medicare supplement policy or certificate shall not indemnify against losses resulting from sickness on a different basis than losses resulting from accidents.

(3) A Medicare supplement policy or certificate shall provide that benefits designed to cover cost sharing amounts under Medicare will be changed automatically to

coincide with any changes in the applicable Medicare deductible amount and co-payment percentage factors. Premiums may be modified to correspond with such changes.

(4) A "noncancellable," "guaranteed renewable," or "noncancellable and guaranteed renewable" Medicare supplement policy shall not:

(a) Provide for termination of coverage of a spouse solely because of the occurrence of an event specified for termination of coverage of the insured, other than the nonpayment of premium; or

(b) Be cancelled or nonrenewed by the insurer solely on the grounds of deterioration of health.

(5) (a) Except as authorized by the Commissioner of this state, an issuer shall neither cancel nor nonrenew a Medicare supplement policy or certificate for any reason other than nonpayment of premium or material misrepresentation.

(b) If a group Medicare supplement insurance policy is terminated by the group policyholder and not replaced as provided in Paragraph (5)(d), the issuer shall offer certificateholders an individual Medicare supplement policy. The issuer shall offer the certificateholder at least the following choices:

(1) An individual Medicare supplement policy currently offered by the issuer having comparable benefits to those contained in the terminated group Medicare supplement policy; and

(2) An individual Medicare supplement policy which provides only such benefits as are required to meet the minimum standards as defined in Section 8B of this regulation.

(c) If membership in a group is terminated, the issuer shall:

(1) Offer the certificateholder the conversion opportunities as are described in Subparagraph (b); or

(2) At the option of the group policyholder, offer the certificateholder continuation of coverage under the group policy.

(d) If a group Medicare supplement policy is replaced by another group Medicare supplement policy purchased by the same policyholder, the issuer of the replacement policy shall offer coverage to all persons covered under the old group policy on its date of termination. Coverage under the new group policy shall not result in any exclusion for preexisting conditions that would have been covered under the group policy being replaced.

(6) Termination of a Medicare supplement policy or certificate shall be without prejudice to any continuous loss which commenced while the policy was in force, but the extension of benefits beyond the period during which the policy was in force may be predicated upon the continuous total disability of the insured, limited to the duration of the

policy benefit period, if any, or to payment of the maximum benefits.

B. Minimum Benefit Standards.

(1) Coverage of Part A Medicare eligible expenses for hospitalization to the extent not covered by Medicare from the 61st day through the 90th day in any Medicare benefit period;

(2) Coverage for either all or none of the Medicare Part A inpatient hospital deductible amount;

(3) Coverage of Part A Medicare eligible expenses incurred as daily hospital charges during use of Medicare's lifetime hospital inpatient reserve days;

(4) Upon exhaustion of all Medicare hospital inpatient coverage including the lifetime reserve days, coverage of ninety percent (90%) of all Medicare Part A eligible expenses for hospitalization not covered by Medicare subject to a lifetime maximum benefit of an additional 365 days;

(5) Coverage under Medicare Part A for the reasonable cost of the first three (3) pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulations) unless replaced in accordance with federal regulations or already paid for under Part B;

(6) Coverage for the coinsurance amount of Medicare eligible expenses under Part B regardless of hospital confinement, subject to a maximum calendar year out-of-pocket amount equal to the Medicare Part B deductible [\$100];

(7) Effective January 1, 1990, coverage under Medicare Part B for the reasonable cost of the first three (3) pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulations), unless replaced in accordance with federal regulations or already paid for under Part A, subject to the Medicare deductible amount.

(8) Cancer Screening every other year for both men and women as recommended by the U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion, except that nothing in this Section shall contravene Section 7.A of this regulation.

(9) Annual influenza immunizations.

Section 8. Benefit Standards for Policies or Certificates Issued or delivered on or after January 1, 1992.

The following standards are applicable to all Medicare supplement policies of certificates delivered or issued for delivery in this State on or after January 1, 1992. No policy or certificate may be advertised, solicited, delivered or issued for delivery in this State as a Medicare supplement policy or certificate unless it complies with these benefit standards.

A. General Standards. The following standards apply to Medicare supplement policies and certificates and are in addition to all other requirements of this regulation.

(1) A Medicare supplement policy or certificate shall not exclude or limit benefits for losses incurred more than six (6) months from the effective date of coverage because it involved a preexisting condition. The policy or certificate may not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six (6) months before the effective date of coverage.

(2) A Medicare supplement policy or certificate shall not indemnify against losses resulting from sickness on a different basis than losses resulting from accident.

(3) A Medicare supplement policy or certificate shall provide that benefits designed to cover cost sharing amounts under Medicare will be changed automatically to coincide with any changes in the applicable Medicare deductible amount and co-payment percentage factors. Premiums may be modified to correspond with such changes.

(4) No Medicare supplement policy or certificate shall provide for termination of coverage of a spouse because of the occurrence of an event specified for termination of coverages of the insured, other than the nonpayment of premium.

(5) Each Medicare supplement policy shall be guaranteed renewable and

(a) The issuer shall not cancel or nonrenew the policy solely on the ground of health status of the individual; and

(b) The issuer shall not cancel or nonrenew the policy for any reason other than nonpayment of premium or materials misrepresentation.

(c) If the Medicare supplement policy is terminated by the group policyholder and is not replaced as provided under Section 8A(5)(e), the issuer shall offer certificate-holders an individual Medicare supplement policy which (at the option of the certificate holder):

(i) Provides for continuation of the benefits contained in the group policy; or

(ii) Provides for such benefits that otherwise meet the requirements of this subsection.

(d) If an individual is a certificateholder in a group Medicare supplement policy and the individual terminates membership in the group, the issuer shall:

(i) Offer the certificateholder the conversion opportunity described in Section 8A(5)(c); or

(ii) At the option of the group policyholder, offer the certificate-holder continuation of coverage under the group policy.

(e) If a group Medicare supplement policy is replaced by another group Medicare supplement policy purchased by the same policyholder, the issuer of the replacement policy shall offer coverage to all persons covered under the old group policy on its date of

termination. Coverage under the new policy shall not result in any exclusion for preexisting conditions that would have been covered under the group policy being replaced.

(6) Termination of a Medicare supplement policy or certificate shall be without prejudice to any continuous loss which commenced while the policy was in force, but the extension of benefits beyond the period during which the policy was in force may be conditioned upon the continuous total disability of the insured, limited to the duration of the policy benefit period, if any, or payment of the maximum benefits.

(7) (a) A Medicare supplement policy or certificate shall provide that benefits and premiums under the policy or certificate shall be suspended at the request of the policyholder or certificateholder for the period (not to exceed twenty-four (24) months) in which the policyholder or certificateholder has applied for and is determined to be entitled to medical assistance under Title XIX of the Social Security Act, but only if the policyholder or certificateholder notifies the issuer of such policy or certificate within ninety (90) days after the date the individual becomes entitled to such assistance. Upon receipt of timely notice, the issuer shall return to the policyholder or certificateholder that portion of the premium attributable to the period of Medicaid eligibility, subject to adjustment for paid claims.

(b) If such suspension occurs and if the policyholder or certificateholder loses entitlement to such medical assistance, such policy or certificate shall be automatically reinstated (effective as of the date of termination of such entitlement) as of the termination of such entitlement, if the policyholder or certificate holder provides notice of loss of such entitlement within ninety (90) days after the date of such loss and pays the premium attributable to the period, effective as of the date of termination of such entitlement.

(c) Reinstitution of such coverages:

(i) Shall not provide for any waiting period with respect to treatment of preexisting conditions;

(ii) Shall provide for coverage which is substantially equivalent to coverage in effect before the date of such suspension; and

(iii) Shall provide for classification of premiums on terms as favorable to the policyholder or certificateholder as the premium classification terms that would have applied to the policyholder or certificateholder had the coverage not been suspended.

B. Standards for Basic ("Core") Benefits Common to All Benefit Plans.

Every issuer shall make available a policy or certificate including only the following basic "core" package of benefits to each prospective insured. An issuer may make available to prospective insureds any of the other Medicare Supplement Insurance Benefit Plans in addition to the basic "core" package, but not in lieu of it:

(1) Coverage of Part A Medicare Eligible Expenses for hospitalization to the extent not covered by Medicare from the 61st day through the 90th day in any Medicare benefit period;

(2) Coverage of Part A Medicare Eligible Expenses incurred for hospitalization to the extent not covered by Medicare for each Medicare lifetime inpatient reserve day used;

(3) Upon exhaustion of the Medicare hospital inpatient coverage including the lifetime reserve days, coverage of the Medicare Part A eligible expenses for hospitalization paid at the Diagnostic Related Group (DRG) day outlier per diem or other appropriate standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider must accept the issuer's payment as payment in full and may not bill the insured for any balance;

(4) Coverage under Medicare Parts A and B for the reasonable cost of the first three (3) pints of blood (or equivalent quantities of packaged red blood cells as defined under federal regulations) unless replaced in accordance with federal regulations.

(5) Coverage for the coinsurance amount (under a prospective payment system) of Medicare Eligible Expenses under Part B regardless of hospital confinement, subject to the Medicare Part B deductible.

C. Standards for Additional Benefits. The following additional benefits shall be included in Medicare Supplement Benefit Plans "B" through "J" only as provided by Section 9 of this Regulation.

(1) Medicare Part A Deductible: Coverage for all of the Medicare Part A inpatient hospital deductible amount per benefit period.

(2) Skilled Nursing Facility Care: Coverage for the actual billed charges up to the coinsurance amount from the 21st day through the 100th day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A.

(3) Medicare Part B Deductible: Coverage for all of the Medicare Part B deductible amount per calendar year regardless of hospital confinement.

(4) Eighty Percent (80%) of the Medicare Part B Excess Charges: Coverage for eighty percent (80%) of the difference between the actual Medicare Part B charge as billed, not to exceed any charge limitation established by the Medicare program or state law, and the Medicare-approved Part B charge.

(5) One Hundred Percent (100%) of the Medicare Part B Excess Charges: Coverage for all of the difference between the actual Medicare Part B charge as billed, not to exceed any charge limitation established by the Medicare program or state law, and the Medicare-approved Part B charge.

(6) Basic Outpatient Prescription Drug Benefit:

Coverage for fifty percent (50%) of outpatient prescription drug charges, after a two hundred fifty dollar (\$250) calendar year deductible, to a maximum of one thousand two hundred fifty dollars (\$1,250) in benefits received by the insured per calendar year, to the extent not covered by Medicare.

(76) Extended Outpatient Prescription Drug Benefit: Coverage for fifty percent (50%) of outpatient prescription drug charges, after a two hundred fifty dollar (\$250) calendar year deductible to a maximum of three thousand dollars (\$3,000) in benefits received by the insured per calendar year, to the extent no coverage by Medicare.

(77) Medically Necessary Emergency Care in a Foreign Country: Coverage to the extent not covered by Medicare for eighty percent (80%) of the billed charges for Medicare-eligible expenses for medically necessary emergency hospital, physician and medical care received in a foreign country, which care would have been covered by Medicare if provided in the United States and which care began during the first sixty (60) consecutive days of each trip outside the United States, subject to a calendar year deductible of two hundred fifty dollars (\$250), and a lifetime maximum benefit of fifty thousand dollars (\$50,000). For purposes of this benefit, "emergency care" shall mean care needed immediately because of an injury or an illness of sudden and unexpected onset.

(98) Preventive Medical Care Benefit: Coverage for the following preventive health services:

(a) An annual clinical preventive medical history and physical examination that may include tests and services from subsection (b) and patient education to address preventive health care measures.

(b) Any one or a combination of the following preventive screening tests or preventive services, the frequency of which is considered medically appropriate.

(1) Fecal occult blood test and/or digital rectal examination, or both;

(2) Mammogram;

(3) Dipstick urinalysis for hematuria, bacteriuria and proteinuria;

(4) Pure tone (air only) hearing screening test, administered by a physician;

(5) Serum cholesterol screening (every five (5) years);

(6) Thyroid function test;

(7) Diabetes screening.

(c) Influenza vaccine administered at any appropriate time during the year and Tetanus and Diphtheria booster (every ten (10) years).

(d) Any other tests or preventive measures determined appropriate by the attending physician.

Reimbursement shall be for the actual charges up to one hundred (100) percent of the Medicare-approved amount for

each service, as if Medicare were to cover the service as identified in American Medical Association Current Procedural Terminology (AMA CPT) codes, to a maximum of one hundred twenty dollars (\$120) annually under this benefit. This benefit shall not include payment for any procedure covered by Medicare.

(109) At-Home Recovery Benefit: Coverage for services to provide short term, at-home assistance with activities of daily living for those recovering from an illness, injury or surgery.

(a) For purposes of this benefit, the following definitions shall apply:

(i) "Activities of daily living" include, but are not limited to bathing, dressing, personal hygiene, transferring, eating, ambulating, assistance with drugs that are normally self-administered, and changing bandages or other dressings.

(ii) "Care provider" means a duly qualified or licensed home health aide or homemaker, personal care aide or nurse provided through a licensed home health care agency or referred by a licensed referral agency or licensed nurses registry.

(iii) "Home" shall mean any place used by the insured as a place of residence, provided that such place would qualify as a residence for home health care services covered by Medicare. A hospital or skilled nursing facility shall not be considered the insured's place of residence.

(iv) "At-home recovery visit" means the period of a visit required to provide at home recovery care, without limit on the duration of the visit, except each consecutive 4 hours in a 24-hour period of services provided by a care provider is one visit.

(b) Coverage Requirements and Limitations

(i) At-home recovery services provided must be primarily services which assist in activities of daily living.

(ii) The insured's attending physician must certify that the specific type and frequency of at-home recovery services are necessary because of a conditioner for which a home care plan of treatment was approved by Medicare.

(iii) Coverage is limited to:

(I) No more than the number and type of at-home recovery visits certified as necessary by the insured's attending physician. The total number of at-home recovery visits shall not exceed the number of Medicare approved home health care visits under a Medicare approved Home Care Plan of Treatment.

(II) The actual charges for each visit up to a maximum reimbursement of forty dollars (\$40) per visit.

(III) One thousand six hundred dollars (\$1,600) per calendar year.

(IV) Seven (7) visits in any one week.

(V) Care furnished on a visiting basis in the

insured's home.

(VI) Services provided by a care provider as defined in this section.

(VII) At-home recovery visits while the insured is covered under the policy or certificate and not otherwise excluded.

(VIII) At-home recovery visits received during the period the insured is receiving Medicare approved home care services or no more than eight (8) weeks after the service date of the last Medicare approved home health care visit.

(c) Coverage is excluded for:

(i) Home care visits paid for Medicare or other government programs; and

(ii) Care provided by family members, unpaid volunteers or providers who are not care providers.

(110) New or Innovative Benefits: An issuer may, with the prior approval of the Commissioner, offer policies or certificates with new or innovative benefits in addition to the benefits provided in a policy or certificate that otherwise complies with the applicable standards. The new or innovative benefits may include benefits that are appropriate to Medicare supplement insurance, new or innovative, not otherwise available, cost-effective, and offered in a manner which is consistent with the goal of simplification of Medicare supplement policies.

**Section 9. Standard Medicare Supplement Benefit Plans**

A. An issuer shall make available to each prospective policyholder and certificateholder a policy form or certificate form containing only the basic "core" benefits, as defined in Section 8B of this regulation.

B. No groups, packages or combinations of Medicare supplement benefits other than those listed in this section shall be offered for sale in this state, except as may be permitted in Section 8B(10) and in Section 10 of this regulation.

C. Benefit plans shall be uniform in structure, language, designation and format to the standard benefit plans "A" through "J" listed in this subsection and conform to the definitions in Section 4 of this regulation. Each benefit shall be structured in accordance with the format provided in Sections 8B and 8C and list of the benefits in the order shown in this subsection. For purposes of this section, "structure, language and format" means style, arrangement and overall content of a benefit.

D. An issuer may use, in addition to the benefit plan designations required in subsection C, other designations to the extent permitted by law.

E. Make-up Benefit Plans:

(1) Standardized Medicare supplement benefit plan "A" shall be limited to the basic ("core") benefits common to all benefit plans, as defined in Section 8B of this regulation.

(2) Standardized Medicare supplement benefit

plan "B" shall include only the following: the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible as defined in Section 8C(1).

(3) Standardized Medicare supplement benefit plan "C" shall include only the following: The core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, Medicare Part B deductible and medically necessary emergency care in a foreign country as defined in Sections 8C(1), (2), (3) and (8) respectively.

(34) Standardized Medicare supplement benefit plan "D" shall include only the following: the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, medically necessary emergency care in a foreign country and the at-home recovery benefit as defined in Section 8C(1), (2), (87) and (109) respectively.

(45) Standardized Medicare supplement benefit plan "E" shall include only the following: the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, medically necessary emergency care in a foreign country and preventive medical Care as defined in Sections 8C(1), (2), (87) and (98) respectively.

(6) Standardized Medicare supplement benefit plan "F" shall include only the following: the core benefit as described in Section 8B of this regulation, plus the Medicare Part A deductible, the skilled nursing facility care, the Part B deductible, one hundred (100%) of the Medicare Part B excess charges, and the medically necessary emergency care in a foreign country as defined in Sections 8C (1), (2), (3), (5) and (8) respectively.

(7) Standardized Medicare supplement benefit high deductible plan "F" shall include only the following: 100% of covered expenses following the payment of the annual high deductible plan "F" deductible. The covered expenses include the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, the Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in Sections 8 C(1), (2), (3), (5) and (8) respectively. The annual high deductible plan "F" deductible shall consist of out-of-pocket expenses, other than premiums, and shall be in addition to any other specific benefit deductibles. The annual high deductible plan "F" deductible shall be \$1500 for 1998 and 1999, and shall be based on the calendar year. It shall be adjusted annually thereafter by the Secretary to reflect the change in the Consumer Price Index for all urban consumers for the twelve-month period ending with August of the preceding year, and rounded to the nearest multiple of \$10.

(8) Standardized Medicare supplement benefit plan "G" shall include only the following: The core benefit

as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, eighty percent (80%) of the Medicare Part B excess charges, medically necessary emergency care in a foreign country and the at-home recovery benefit as defined in Sections 8C(1), (2), (4), (8) and (10) respectively.

(9) Standardized Medicare supplement benefit plan "H" shall include only the following: the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, basic prescription drug benefit and medically necessary emergency care in a foreign country as defined in Sections 8C(1), (2), (6), and (8) respectively.

(10) Standardized Medicare supplement benefit plan "I" shall consist of only the following: the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, one hundred percent (100%) of the Medicare Part B excess charges, basic prescription drug benefit, medically necessary emergency care in a foreign country and at-home recovery benefit as defined in Sections 8C(1), (2), (5), (6), (8) and (10) respectively.

(11) Standardized Medicare supplement benefit plan "J" shall consist of only the following: the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, extended prescription drug benefit, medically necessary emergency care in a foreign country, preventive medical care and at-home recovery benefit as defined in Section 8C(1), (2), (3), (5), (7), (8), (9) and (10) respectively.

(12) Standardized Medicare supplement benefit high deductible plan "J" shall consist of only the following: 100% of covered expenses following the payment of the annual high deductible plan "J" deductible. The covered expenses include the core benefit as defined in Section 8B of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, the Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, extended outpatient drug benefit, medically necessary emergency care in a foreign country, preventive medical care benefit and at-home recovery benefit as defined in Sections 8 C(1), (2), (3), (5), (7), (8), (9) and (10), respectively. The annual high deductible plan "J" deductible shall consist of out-of-pocket expenses, other than premiums, for services covered by the Medicare supplement plan "J" policy, and shall be in addition to any other specific benefit deductibles. The annual high deductible plan "J" deductible shall be \$1500 for 1998 and 1999, and shall be based on the calendar year. It shall be adjusted annually thereafter by the Secretary to reflect the change in the Consumer Price Index for all urban consumers for the twelve-month period ending with August of the preceding

year, and rounded to the nearest multiple of \$10.

Section 10. Medicare Select Policies and Certificates:

A. (1) This section shall apply to Medicare Select policies and certificates, as defined in this section.

(2) No policy or certificate may be advertised as a Medicare Select policy or certificate unless it meets the requirements of this section.

B. For the purposes of this section:

(1) "Complaint" means any dissatisfaction expressed by an individual concerning a Medicare Select issuer or its network providers.

(2) "Grievance" means dissatisfaction expressed in writing by an individual insured under a Medicare Select policy or certificate with the administration, claims practices or provision of services concerning a Medicare Select issuer or its network providers.

(3) "Medicare Select issuer" means an issuer offering, or seeking to offer, a Medicare Select policy or certificate.

(4) "Medicare Select policy" or "Medicare Select certificate" mean respectively a Medicare supplement policy or certificate that contains restricted network provisions.

(5) "Network provider" means a provider of health care, or a group of providers of health care which has entered into a written agreement with the issuer to provide benefits insured under a Medicare Select policy.

(6) "Restricted network provision" means any provision which conditions the payment of benefits, in whole or in part, on the use of network providers.

(7) "Service area" means the geographic area approved by the Commissioner within which an issuer is authorized to offer a Medicare Select policy.

C. The Commissioner may authorize an issuer to offer a Medicare Select policy or certificate, pursuant to his section and section 4358 of the Omnibus Budget Reconciliation Act (OBRA) of 1990 if the Commissioner finds that the issuer has satisfied all of the requirements of this regulation.

D. A Medicare Select issue shall not issue a Medicare Select policy or certificate in this State until its plan of operation has been approved by the Commissioner.

E. A Medicare Select issuer shall file a proposed plan of operation with the Commissioner in a format prescribed by the Commissioner. The plan of operation shall contain at least the following information:

(1) Evidence that all covered services that are subject to restricted network provisions are available and accessible through network providers, including a demonstration that:

(a) Services can be provided by network providers with reasonable promptness with respect to geographic location, hours of operation and after-hour care.

The hours of operation and availability of after-hour care shall reflect usual practice in the local area. Geographic availability shall reflect the usual travel times within the community.

(b) The number of network providers in the service area is sufficient, with respect to current and expected policyholders, either:

(i) To deliver adequately all services that are subject to a restricted network provision; or

(ii) To make appropriate referrals.

(c) There are written agreements with network providers describing specific responsibilities.

(d) Emergency care is available twenty-four (24) hours per day and seven (7) days per week.

(e) In the case of covered services that are subject to a restricted network basis, there are written agreements with network providers prohibiting the providers from billing or otherwise seeking reimbursement from or recourse against any individual insured under a Medicare Select policy or certificate. This paragraph shall not apply to supplemental charges or coinsurance amounts as stated in the Medicare Select policy or certificate.

(2) A statement or map providing a clear description of the service area.

(3) A description of the grievance procedure to be utilized.

(4) A description of the quality assurance program, including:

(a) The formal organizational structure;

(b) The written criteria for selection, retention and removal of network providers; and

(c) The procedures for evaluating the quality of care provided by network providers, and the process to initiate corrective action when warranted.

(5) A list and description, by specialty, of the network providers.

(6) Copies of the written information proposed to be used by the issuer to comply with subsection I.

(7) Any other information requested by the Commissioner.

F. (1) A Medicare Select issuer shall file any proposed changes to the plan of operation, except for changes to the list of network providers with the Commissioner prior to implementing such changes. Such changes shall be considered approved by the Commissioner after thirty (30) days unless specifically disapproved.

(2) An updated list of network providers shall be filed with the Commissioner at least quarterly.

G. A Medicare Select policy or certificate shall not restrict payment for covered services provided by non-network providers if:

(1) The services are for symptoms requiring emergency care or are immediately required for an unforeseen illness, injury or a condition; and

(2) It is not reasonable to obtain such services through a network provider.

H. A Medicare Select policy or certificate shall provide payment for full coverage under the policy for covered services that are not available through network providers.

I. A Medicare Select issuer shall make a full and fair disclosure in writing of the provisions, restrictions, and limitations of the Medicare Select policy or certificate to each applicant. This disclosure shall include at least the following:

(1) An outline of coverage sufficient to permit the applicant to compare the coverage and premiums of the Medicare Select policy or certificate with:

(a) Other Medicare supplement policies or certificates offered by the issuer; and

(b) Other Medicare Select policies or certificates.

(2) A description (including address, phone number and hours of operation) of the network providers, including primary care physicians, specialty physicians, hospitals, and other providers.

(3) A description of the restricted network provisions, including payments for coinsurance and deductibles when providers other than network providers are utilized.

(4) A description of coverage for emergency and urgently needed care and other out of service area coverage.

(5) A description of limitations on referrals to restricted network providers and to other providers.

(6) A description of the policyholder's rights to purchase any other Medicare supplement policy or certificate otherwise offered by the issuer.

(7) A description of the Medicare Select issuer's quality assurance program and grievance procedure.

J. Prior to the sale of a Medicare Select policy or certificate, a Medicare Select issuer shall obtain from the applicant a signed and dated form stating that the applicant has received the information provided pursuant to Subsection I of this section and that the applicant understands the restrictions of the Medicare Select policy or certificate.

K. A Medicare Select issuer shall have and use procedures for hearing complaints and resolving written grievances from the subscribers. Such procedures shall be aimed at mutual agreement for settlement and may include arbitration procedures.

(1) The grievance procedure shall be described in the policy and certificates and in the outline of coverage.

(2) At the time the policy or certificate is issued, the issuer shall provide detailed information to the policyholder describing how a grievance may be registered with the issuer.

(3) Grievances shall be considered in a timely

manner and shall be transmitted to appropriate decision-makers who have authority to fully investigate the issue and take corrective action.

(4) If a grievance is found to be valid, corrective action shall be taken promptly.

(5) All concerned parties shall be notified about the results of a grievance.

(6) The issuer shall report no later than each March 31st to the Commissioner regarding its grievance procedure. The report shall be in a format prescribed by the Commissioner and shall contain the number of grievances filed in the past year and a summary of the subject, nature and resolution of such grievances.

L. At the time of initial purchase, a Medicare Select issuer shall make available to each applicant for a Medicare Select policy or certificate the opportunity to purchase any Medicare supplement policy or certificate otherwise offered by the issuer.

M. (1) At the request of an individual insured under a Medicare Select policy or certificate, a Medicare Select issuer shall make available to the individual insured the opportunity to purchase a Medicare supplement policy or certificate offered by the issuer which has comparable or lesser benefits and which does not contain a restricted network provision. The issuer shall make the policies or certificates available without requiring evidence of insurability after the Medicare Select policy or certificate has been in force for six (6) months.

(2) For the purposes of this subsection, a Medicare supplement policy or certificate will be considered to have comparable or lesser benefits unless it contains one or more significant benefits not included in the Medicare Select policy or certificate being replaced. For the purposes of this paragraph, a significant benefit means coverage for the Medicare Part A deductible, coverage for prescription drugs, coverage for at-home recovery services or coverage for Part B excess charges.

N. Medicare Select policies and certificates shall provide for continuation of coverage in the event the Secretary of Health and Human Services determines that Medicare Select policies and certificates issued pursuant to this section should be discontinued due to either the failure of the Medicare Select Program to be reauthorized under law or its substantial amendment.

(1) Each Medicare Select issuer shall make available to each individual insured under a Medicare Select policy or certificate the opportunity to purchase any Medicare supplement policy or certificate offered by the issuer which has comparable or lesser benefits and which does not contain a restricted network provision. The issuer shall make such policies and certificates available without requiring evidence of insurability.

(2) For the purposes of this subsection, a Medicare supplement policy or certificate will be considered to have

comparable or lesser benefits unless it contains one or more significant benefits not included in the Medicare Select policy or certificate being replaced. For the purposes of this paragraph, a significant benefit means coverage for the Medicare Part A deductible, coverage for prescription drugs, coverage for at-home recovery services or coverages for Part B excess charges.

O. A Medicare Select issuer shall comply with reasonable requests for data made by state or federal agencies, including the United States Department of Health and Human Services, for the purpose of evaluating the Medicare Select Program.

Editor's Note: Section 10, Medicare Select Policies and Certificates, of this Regulation is effective October 6, 1995, pursuant to President Clinton's signing H.R. 483 on July 7, 1995, permitting Medicare Select policies to be offered in all fifty states, and the Delaware Insurance Commissioner's amending this regulation pursuant to 29 Del. C. 10013(b)(5).

#### Section 11. Open Enrollment

A. An issuer shall not deny or condition the issuance or effectiveness of any Medicare supplement policy or certificate available for sale in this state, nor discriminate in the pricing of such a policy or certificate because of the health status, claims experience, receipt of health care, or medical condition of an applicant in the case of an application for a policy or certificate that is submitted prior to or during the six (6) month period beginning with the first day of the first month in which an individual is both 65 years of age or older and is enrolled for benefits under Medicare Part B. Each Medicare supplement policy and certificate currently available from an issuer shall be made available to all applicants who qualify under this subsection without regard to age [**or eligibility for a group Medicare supplement plan. At a minimum, issuers shall make available, in accordance with this section, Medicare supplement policies or certificates having benefit packages classified as Plans A, B, C and F**].

B. (1) If an applicant qualifies under Subsection A and submits an application during the time period referenced in Subsection A and, as of the date of the application, has had a continuous period of creditable coverage of at least six months, the issuer shall not exclude benefits based on a preexisting condition.

(2) If the applicant qualifies under Subsection A and submits an application during the time period referenced in Subsection A and, as of the date of application, has had a continuous period of creditable coverage that is less than six months, the issuer shall reduce the period of any preexisting condition exclusion by the aggregate of the period of creditable coverage applicable to the applicant as of the enrollment date. The Secretary shall specify the manner of

the reduction under this subsection.

CB. Except as provided in Section 223, subsection A shall not be construed as preventing the exclusion of benefits under a policy, during the first six (6) months, based on a preexisting condition for which the policyholder or certificateholder received treatment or was otherwise diagnosed during the six (6) months before the coverage became effective.

Section 12. Guaranteed Issue for Eligible Persons

A. Guaranteed Issue

(1) Eligible persons are those individuals described in Subsection B who apply to enroll under the policy not later than sixty-three (63) days after the date of the termination of enrollment described in Subsection B, and who submit evidence of the date of termination or disenrollment with the application for a Medicare supplement policy.

(2) With respect to eligible persons, an issuer shall not deny or condition the issuance or effectiveness of a Medicare supplement policy described in Subsection C that is offered and is available for issuance to new enrollees by the issuer, shall not discriminate in the pricing of such a Medicare supplement policy because of health status, claims experience, receipt of health care, or medical condition, and shall not impose an exclusion of benefits based on a preexisting condition under such a Medicare supplement policy.

B. Eligible Persons

An eligible person is an individual described in any of the following paragraphs:

(1) The individual is enrolled under an employee welfare benefit plan that provides health benefits that supplement the benefits under Medicare; and the plan terminates, or the plan ceases to provide all such supplemental health benefits to the individual; or the individual is enrolled under an employee welfare benefit plan that is primary to Medicare and the plan terminates or the plan ceases to provide all health benefits to the individual because the individual leaves the plan;

(2) The individual is enrolled with a Medicare+Choice organization under a Medicare+Choice plan under part C of Medicare, and any of the following circumstances apply:

(i) The organization's or plan's certification [under this part] has been terminated or the ~~for organizations!~~ **[organization]** has terminated or otherwise discontinued providing the plan in the area in which the individual resides;

(ii) The individual is no longer eligible to elect the plan because of a change in the individual's place of residence or other change in circumstances specified by the Secretary, but not including termination of the individual's enrollment on the basis described in Section 1851(g)(3)(B)

of the federal Social Security Act (where the individual has not paid premiums on a timely basis or has engaged in disruptive behavior as specified in standards under Section 1856), or the plan is terminated for all individuals within a residence area;

(iii) The individual demonstrates, in accordance with guidelines established by the Secretary, that:

(I) The organization offering the plan substantially violated a material provision of the organization's contract under this part in relation to the individual, including the failure to provide an enrollee on a timely basis medically necessary care for which benefits are available under the plan or the failure to provide such covered care in accordance with applicable quality standards; or

(II) The organization, or agent or other entity acting on the organization's behalf, materially misrepresented the plan's provisions in marketing the plan to the individual; or

(iv) The individual meets such other exceptional conditions as the Secretary may provide."

(3) (a) The individual is enrolled with:

(i) An eligible organization under a contract under Section 1876 (Medicare risk or cost);

(ii) A similar organization operating under demonstration project authority, effective for periods before April 1, 1999;

(iii) An organization under an agreement under Section 1833(a)(1)(A) (health care prepayment plan); or

(iv) An organization under a Medicare Select policy; and

(b) The enrollment ceases under the same circumstances that would permit discontinuance of an individual's election of coverage under Section 12B(2).

(4) The individual is enrolled under a Medicare supplement policy and the enrollment ceases because:

(a) (i) Of the insolvency of the issuer or bankruptcy of the nonissuer organization; or

(ii) Of other involuntary termination of coverage or enrollment under the policy;

(b) The issuer of the policy substantially violated a material provision of the policy; or

(c) The issuer, or an agent or other entity acting on the issuer's behalf, materially misrepresented the policy's provisions in marketing the policy to the individual;

(5) (a) The individual was enrolled under a Medicare supplement policy and terminates enrollment and subsequently enrolls, for the first time, with any Medicare+Choice organization under a Medicare+Choice plan under part C of Medicare, any eligible organization under a contract under Section 1876 (Medicare risk or cost), any similar organization operating under demonstration project authority, an organization under an agreement under section 1833(a)(1)(A) (health care prepayment plan), or a

Medicare Select policy; and

(b) ~~The subsequent enrollment under subparagraph (a) is terminated by the enrollee during any period within the first twelve (12) months of such subsequent enrollment (during which the enrollee is permitted to terminate such subsequent enrollment under section 1851(e) of the federal Social Security Act); or~~

(6) ~~The individual, upon first becoming enrolled in Medicare part B at age 65 or older, enrolls in a Medicare+Choice plan under Part C of Medicare, and disenrolls from the plan by not later than twelve (12) months after the effective date of enrollment.~~

#### C. Products to Which Eligible Persons are Entitled

The Medicare supplement policy to which eligible persons are entitled under:

(1) ~~Section 12B(1), (2), (3) and (4) is a Medicare supplement policy which has a benefit package classified as Plan A, B, C, or F offered by any issuer.~~

(2) ~~Section 12B(5) is the same Medicare supplement policy in which the individual was most recently previously enrolled, if available from the same issuer, or, if not so available, a policy described in Subsection C(1).~~

(3) ~~Section 12B(6) shall include any Medicare supplement policy offered by any issuer.~~

#### D. Notification Provisions

(1) ~~At the time of an event described in Subsection B of this section because of which an individual loses coverage or benefits due to the termination of a contract or agreement, policy, or plan, the organization that terminates the contract or agreement, the issuer terminating the policy, or the administrator of the plan being terminated, respectively, shall notify the individual of his or her rights under this section, and of the obligations of issuers of Medicare supplement policies under Subsection A. Such notice shall be communicated contemporaneously with the notification of termination.~~

(2) ~~At the time of an event described in Subsection B of this section because of which an individual ceases enrollment under a contract or agreement, policy, or plan, the organization that offers the contract or agreement, regardless of the basis for the cessation of enrollment, the issuer offering the policy, or the administrator of the plan, respectively, shall notify the individual of his or her rights under this section, and of the obligations of issuers of Medicare supplement policies under Section 12A. Such notice shall be communicated within ten (10) working days of the issuer receiving notification of disenrollment.~~

~~E. Consumer Protections for the Eligible Persons of 1999:~~

(1) ~~The eligible persons of 1999 are those persons who meet the definition of eligible persons set forth in Section 12 B on or about January 1, 1999, including those persons who were originally eligible for Medicare benefits~~

~~due to disability.~~

(2) ~~Notwithstanding any provision of this regulation to the contrary, issuers of Medicare supplement policies or certificates shall:~~

(a) ~~File forms with the Department for standardized plans A, B, C and F described in Section 9 above for any such plans not on file with the Department as of the date of this amendment on or before October 61, 1998;~~

(b) ~~Offer such plans on a guaranteed issue basis to the eligible persons of 1999 in conformance with the provisions of subsections A. and B. of Section 12 above;~~

(c) ~~Not discriminate in the pricing of any Medicare supplement policy offered to eligible persons of 1999 because of health status, claims experience, receipt of health care, or medical condition and shall not impose an exclusion of benefits based on a pre-existing condition; and~~

(d) ~~Give written notice of the availability of guaranteed issue plans A, B, C, and F to the eligible persons of 1999 to whom they solicit Medicare supplement policies.~~

(3) ~~Issuers of Medicare supplement policies and certificates shall certify in writing that the plans filed in accordance with this section are identical with the exception of benefit package to Medicare supplement plans that such issuer currently has on file with the Department. Such issuers shall submit required filings such as outlines of coverage on or before November 1, 1999.~~

(4) ~~Any provision of this regulation not in direct conflict the provisions of this subsection E shall remain in full force an effect.~~

~~[Filing deadline set by adoption of Life and Health Bulletin No. 21 on October 6, 1998.]~~

#### Section 13. Standards for Claims Payment

A. An issuer shall comply with Section 1882(c)(3) of the Social Security Act (as enacted by Section 4081(b)(2)(C) of the Omnibus Budget Reconciliation Act of 1987 (OBRA), Pub. L. No. 100—203) by:

(1) ~~Accepting a notice from a Medicare carrier on dually assigned claims submitted by participating physicians and suppliers as a claim for benefits in place of any other claim form otherwise required and making a payment determination on the basis of the information contained in that notice;~~

(2) ~~Notifying the participating physician or supplier and the beneficiary of the payment determination;~~

(3) ~~Paying the participating physician or supplier directly;~~

(4) ~~Furnishing at the time of enrollment, each enrollee with a card listing the policy name, number, and a central mailing address to which notices from a Medicare carrier may be sent;~~

(5) ~~Paying user fees for claim notices that are~~

transmitted electronically or otherwise; and

(6) Providing to the Secretary of Health and Human Services, at least annually, a central mailing address to which all claims may be sent by Medicare carriers.

B. Compliance with the requirements set forth in Subsection A above shall be certified on the Medicare supplement insurance experience reporting form.

### Section 143. Loss Ratio Standards and Refund or Credit of Premium

#### A. Loss Ratio Standards

(1) (a) A Medicare Supplement policy form or certificate form shall not be delivered or issued for delivery unless the policy form or certificate form can be expected, as estimated for the entire period for which rates are computed to provide coverage, to return to policyholders and certificateholders in the form of aggregate benefits (not including anticipated refunds or credits) provided under the policy form or certificate form:

(i) At least 75 percent of the aggregate amount of premiums earned in the case of group policies, or

(ii) At least 65 percent of the aggregate amount of premiums earned in the case of individual policies,

(b) Calculated on the basis of incurred claims experience or incurred health care expenses where coverage is provided by a health maintenance organization on a service rather than reimbursement basis and earned premiums for such period and in accordance with accepted actuarial principles and practices.

(2) All filings of rates and rating schedules shall demonstrate that expected claims in relation to premiums comply with the requirements of this section when combined with actual experience to date. Filings of rate revisions shall also demonstrate that the anticipated loss ratio over the entire future period for which the revised rates are computed to provide coverage can be expected to meet the appropriate loss ratio standards.

(3) For purposes of applying subsection A(1) of this Section and Subsection C(3) of Section 14 only, policies issued as a result of solicitations of individuals through the mails or by mass media advertising (including both print and broadcast advertising) shall be deemed to be individual policies.

#### B. Refund or Credit Calculation

(1) An issuer shall collect and file with the Commissioner by May 31 of each year the data contained in the applicable reporting form contained in Appendix A for each type in a standard Medicare supplement benefit plan.

(2) If on the basis of the experience as reported the benchmark ratio since inception (ratio 1) exceeds the adjusted experience ratio since inception (ratio 3), then a refund or credit calculation is required. The refund calculation shall be done on a statewide basis for each type

in a standard Medicare supplement benefit plan. For purposes of the refund or credit calculation, experience on policies issued within the reporting year shall be excluded.

(3) For the purposes of this section, policies or certificates issued prior to January 1, 1992, the issuer shall make the refund or credit calculation separately for all individual policies (including all group policies subject to an individual loss ratio standard when issued) combined and all other group policies combined for experience after the (effective date of this amendment). The first such report shall be due by May 31, 1998.

(4) A refund or credit shall be made only when the benchmark loss ratio exceeds the adjusted experience loss ratio and the amount to be refunded or credited exceeds a de minimis level. The refund shall include interest from the end of the calendar year to the date of the refund or credit at a rate specified by the Secretary of Health and Human Services, but in no event shall it be less than the average rate of interest for 13-week Treasury notes. A refund or credit against premiums due shall be made by September 30 following the experience year upon which the refund or credit is based

#### C. Annual Filing of Premium Rates

An issuer of Medicare supplement policies and certificates issued before or after the effective date of January 1, 1992 in this State shall file annually its rates, rating schedule and supporting documentation including ratios of incurred losses to earned premiums by policy duration for approval by the Commissioner in accordance with the filing requirements and procedures prescribed by the Commissioner. The supporting documentation shall also demonstrate in accordance with actuarial standards of practice using reasonable assumptions that the appropriate loss ratio standards can be expected to be met over the entire period for which rates are computed. Such demonstration shall exclude active life reserves. An expected third-year loss ratio which is greater than or equal to the applicable percentage shall be demonstrated for policies or certificates in force less than three (3) years. As soon as practicable, but prior to the effective date of enhancements in Medicare benefits, every issuer of Medicare supplement policies or Medicare supplement policies or certificates in this State shall file with the Commissioner, in accordance with the applicable filing procedures of this State:

(1) (a) Appropriate premium adjustments necessary to produce loss ratios as anticipated for the current premium for the applicable policies or contracts. The supporting documents as necessary to justify the adjustment shall accompany the filing.

(b) An issuer shall make such premium adjustments as are necessary to produce an expected loss ratio under the policy or certificate to conform with minimum loss ratio standards for Medicare supplement policies and which are expected to result in a loss ratio at

least as great as that originally anticipated in the rates used to produce current premiums by the issuer for the Medicare supplement insurance policies or certificates. No premium adjustment which would modify the loss ratio experience under the policy other than the adjustments described herein should be made with respect to a policy at any time other than upon its renewal date or anniversary date.

(c) If an issuer fails to make premium adjustments acceptable to the Commissioner, the Commissioner may order premium adjustments, refunds, or premium credits deemed necessary to achieve the loss ratio required by this section.

(2) Any appropriate riders, endorsements or policy forms needed to accomplish the Medicare supplement policy or certificate modifications necessary to eliminate benefit duplications with Medicare. The riders, endorsements or policy forms shall provide a clear description of the Medicare supplement benefits provided by the policy or certificate.

#### D. Public Hearings

The Commissioner may conduct a public hearing to gather information concerning a request by an issuer for an increase in a rate for a policy form or certificate form issued before or after the effective date of this Regulation if the experience of the form for the previous reporting period is not in compliance with the applicable loss ratio standard. The determination of compliance is made without consideration of any refund or credit for such reporting period. Public notice of the hearing shall be furnished in a manner deemed appropriate by the Commissioner.

#### Section 154. Filing and Approval of Policies and Certificates and Premium Rates

A. An issuer shall not deliver or issue for delivery a policy or certificate to a resident of this State unless the policy form or certificate form has been filed with and approved by the Commissioner in accordance with filing requirements and procedures prescribed by the Commissioner.

B. An issuer shall not use or change premium rates for a Medicare supplement policy or certificate unless the rates, rating schedule and supporting documentation have been filed with and approved by the Commissioner in accordance with the filing requirements and procedures prescribed by the Commissioner.

C. (1) Except as provided in paragraph (2) of this subsection, an insurer shall not file for approval more than one form of a policy or certificate of each type for each standard Medicare supplement benefit plan.

(2) An issuer may offer, with the approval of the Commissioner, up to four additional policy forms or certificate forms of the same type for the same standard Medicare supplement benefit plan, one for each of the following cases.

(a) The inclusion of new or innovative benefits;

(b) The addition of either direct response or agent marketing methods;

(c) The addition of either guaranteed issue or underwritten coverage;

(d) The offering of coverage to individuals eligible for Medicare by reason of disability.

(3) For the purposes of this action, a "type" means an individual policy, a group policy, an individual Medicare Select policy, or a group Medicare Select policy.

D. (1) Except as provided in paragraph (1)(a), an issuer shall continue to make available for purchase any policy form or certificate form issued after the effective date of this Regulation that has been approved by the Commissioner. A policy form or certificate form shall not be considered to be available for purchase unless the issuer has actively offered it for sale in the previous twelve months.

(a) An issuer may discontinue the availability of a policy form or certificate form if the issuer provides to the Commissioner in writing its decision at least 30 days prior to discontinuing the availability of the form of the policy or certificate. After receipt of the notice by the Commissioner, the issuer shall no longer offer for sale the policy form or certificate form in this State.

(b) An issuer that discontinues the availability of a policy form or certificate form pursuant to subparagraph (a) shall not file for approval a new policy form or certificate form of the same type for the same standard Medicare supplement benefit plan as the discontinued form for a period of five (5) years after the issuer provides notice to the Commissioner of the discontinuance. The period of discontinuance may be reduced if the Commissioner determined that a shorter period is appropriate.

(2) The sale or other transfer of Medicare supplement business to another issuer shall be considered a discontinuance for the purposes of this subsection.

(3) A change in the rating structure or methodology shall be considered a discontinuance under paragraph (1) unless the issuer complies with the following requirements:

(a) The issuer provides an actuarial memorandum, in a form and manner prescribed by the Commissioner, describing the manner in which the revised rating methodology and resultant rates differ from the existing rating methodology and existing rates.

(b) The issuer does not subsequently put into effect a change of rates or rating factors that would cause the percentage differential between the discontinued and subsequent rates as described in the actuarial memorandum to change. The Commissioner may approve a change to the differential which is in the public interest.

E. (1) Except as provided in paragraph (2), the experience of all policy forms or certificate forms of the

same type in a standard Medicare supplement benefit plan shall be combined for purposes of the refund or credit calculation prescribed in Section 13 hereof.

(2) Forms assumed under an assumption reinsurance agreement shall not be combined with the experience of other forms for purposes of the refunds or credit calculation.

#### Section 165. Permitted Compensation Arrangements

A. An issuer or other entity may provide commission or other compensation to an agent or other representative for the sale of a Medicare supplement policy or certificate only if the first year commission or other first year compensation is no more than two hundred percent (200%) of the commission or other compensation paid for selling or servicing the policy or certificate in the second year or period.

B. The commission or other compensation provided in subsequent (renewal) years must be the same as that provided in the second year or period and must be provided for no fewer than five (5) renewal years.

C. No issuer or other entity shall provide compensation to its agents or other producers and no agent or producer shall receive compensation greater than the renewal compensation payable by the replacing issuer or renewal policies or certificates if an existing policy or certificate is replaced.

D. For purposes of this section, "compensation" includes pecuniary or non-pecuniary remuneration of any kind relating to the sale or renewal of the policy or certificate including but not limited to bonuses, gifts, prizes, awards and finders fees.

#### Section 176. Required Disclosure Provisions

##### A. General Rules.

(1) Medicare supplement policies and certificates shall include a renewal or continuation provision. The language or specifications of the provision must be consistent with the type of contract issued. Such provision shall be appropriately captioned and shall appear on the first page of the policy and shall include any reservation by the issuer of the right to change premiums and any automatic renewal premium increases based on the policyholder's age.

(2) Except for riders or endorsements by which the issuer effectuates a request made in writing by the insured, exercises a specifically reserved right under a Medicare supplement policy, or is required to reduce or eliminate benefits to avoid duplication of Medicare benefits, all riders or endorsements added to a Medicare supplement policy after date of issue or at reinstatement or renewal which reduce or eliminate benefits or coverage in the policy shall require a signed acceptance by the insured. After the date of the policy or certificate issue, any rider or endorsement which increases benefits or coverage with a concomitant

increase in premium during the policy term shall be agreed to in writing signed by the insured, unless the benefits are required by the minimum standards for Medicare supplement policies, or if the increased benefits or coverage is required by law. Where a separate additional premium is charged for benefits provided in connection with riders or endorsements, the premium charge shall be set forth in the policy.

(3) Medicare supplement policies or certificates shall not provide for the payment of benefits based on standards described as "usual and customary," "reasonable and customary" or words of similar import.

(4) If a Medicare supplement policy or certificate contains any limitations with respect to preexisting conditions, such limitations shall appear as a separate paragraph of the policy and be labeled as "Preexisting Condition Limitations."

(5) Medicare supplement policies and certificates shall have a notice prominently printed on the first page of the policy or certificate or attached thereto stating in substance that the policyholder or certificateholder shall have the right to return the policy or certificate within thirty (30) days of its delivery and to have the premium refunded if, after examination of the policy or certificate, the insured person is not satisfied for any reason.

(6) (a) Issuers of accident and sickness policies or certificates which provide hospital or medical expense coverage on an expense incurred or indemnity basis to a person(s) eligible for Medicare shall provide to those applicants a "Guide to Health Insurance for People with Medicare" in the form developed jointly by the National Association of Insurance Commissioners and the Health Care Financing Administration and in a type size no smaller than 12 point type. Delivery of the Buyer's Guide shall be made whether or not such policies or certificates are advertised, solicited or issued as Medicare supplement policies or certificates as defined in this regulation. Except in the case of direct response issuers, delivery of the Buyer's Guide shall be made to the applicant at the time of application and ~~acknowledgment~~ ~~acknowledgement~~ receipt of the Buyer's Guide shall be obtained by the issuer. Direct response issuers shall deliver the Buyer's Guide to the applicant upon request but not later than at the time the policy is delivered.

(b) For purposes of this section, "form" means the language, format, type size, type proportional spacing, bold character, and line spacing.

##### B. Notice Requirements.

(1) As soon as practicable, but no later than thirty (30) days prior to the annual effective date of any Medicare benefit changes, an issuer shall notify its policyholders and certificateholders of modifications it has made to Medicare supplement insurance policies or certificates in a format acceptable to the Commissioner. The notice shall:

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(a) Include a description of revisions to the Medicare program and a description of each modification made to the coverage provided under the Medicare supplement policy or certificate, and

(b) Inform each policyholder or certificateholder as to when any premium adjustment is to be made due to changes in Medicare.

(2) The notice of benefit modifications and any premium adjustments shall be in outline form and in clear and simple terms so as to facilitate comprehension.

(3) Such notices shall not contain or be accompanied by any solicitation.

**C. Outline of Coverage Requirements for Medicare Supplement Policies.**

(1) Issuers shall provide an outline of coverage to all applicants at the time application is presented to the prospective applicant and, except for direct response policies, shall obtain an acknowledgment of receipt of the outline from the applicant; and

(2) If an outline of coverage is provided at the time of application and the Medicare supplement policy or certificate is issued on a basis which would require revision of the outline, a substitute outline of coverage properly describing the policy or certificate shall accompany such policy or certificate when it is delivered and contain the following statement, in no less than twelve (12) point type, immediately above the company name:

"NOTICE: Read this outline of coverage carefully. It is not identical to the outline of coverage provided upon application and the coverage originally applied for has not been issued."

(3) The outline of coverage provided to applicants pursuant to this Section consists of four parts: a cover page, premium information disclosure pages, and charts displaying

the features of each benefit plan offered by the issuer. The outline of coverage shall be in the language and format prescribed below in no less than twelve (12) point type. All plans A, B, C, D, E, F, G, H, I and J, ~~D, E, I, and J~~ shall be shown on the cover page, and the plan(s) that are offered by this issuer shall be prominently identified. Premium information for plans that are offered shall be shown on the cover page or immediately following the cover page and shall be prominently displayed. The premium and mode shall be stated for all plans that are offered to the prospective applicant. All possible premiums for the prospective applicant shall be illustrated.

(4) The following items shall be included in the outline of coverage in the order prescribed below.

[COMPANY NAME]  
Outline of Medicare Supplement Coverage Cover Page  
Benefit Plan(s) \_\_\_\_\_ [insert letters of plan(s) being offered]

Medicare supplement insurance can be sold in only six ten standard plans, plus two high deductible plans. This chart shows the benefits included in each plan. Every company must make available ~~Plan "A"~~ **[Plans "A, B, C, and F"]**. ~~Some plans may not be available in your state.~~ **[Plans other than A, B, C and F may be offered on a voluntary basis.]**

- BASIC BENEFITS: Included in All Plans.
- Hospitalization: Part A coinsurance plus coverage for 365 additional days after Medicare benefits end.
- Medical Expenses: Part B coinsurance (**[generally]** 20% of Medicare-approved expenses), **[in the case of hospital outpatient department services]** or, under a prospective payment system, applicable copayments.
- Blood: First three pints of blood each year.

| A              | B                 | C                            | D                            | E                            | F F <sup>4</sup>             | G                            | H                            | I                            | J J <sup>4</sup>             |
|----------------|-------------------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|
| Basic Benefits | Basic Benefits    | Basic Benefits               | Basic Benefits               | Basic Benefits               | Basic Benefits               | Basic Benefits               | Basic Benefits               | Basic Benefits               | Basic Benefits               |
|                |                   | Skilled Nursing Co-Insurance |
|                | Part A Deductible | Part A Deductible            | Part A Deductible            | Part A Deductible            | Part A Deductible            | Part A Deductible            | Part A Deductible            | Part A Deductible            | Part A Deductible            |
|                |                   | Part B Deductible            |                              |                              | Part B Deductible            |                              |                              |                              | Part B Deductible            |
|                |                   |                              |                              |                              | Part B Excess (100%)         | Part B Excess (80%)          |                              | Part B Excess (100%)         | Part B Excess (100%)         |

|  |  |                          |                          |                          |                          |                          |                             |                             |                                |
|--|--|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|-----------------------------|-----------------------------|--------------------------------|
|  |  | Foreign Travel Emergency    | Foreign Travel Emergency    | Foreign Travel Emergency       |
|  |  |                          | At-Home Recovery         |                          |                          | At-Home Recovery         |                             | At-Home Recovery            | At-Home Recovery               |
|  |  |                          |                          |                          |                          |                          | Basic Drugs (\$1,250 Limit) | Basic Drugs (\$1,250 Limit) | Extended Drugs (\$3,000 Limit) |
|  |  |                          |                          | Preventive Care          |                          |                          |                             |                             | Preventive Care                |

**PREMIUM INFORMATION [Boldface Type]**

We [insert issuer's name] can only raise your premium if we raise the premium for all policies like yours in this State. [If the premium is based on the increasing age of the insured, include information specifying when premiums will change.]

**DISCLOSURES [Boldface Type]**

Use this outline to compare benefits and premiums among policies.

**READ YOUR POLICY VERY CAREFULLY [Boldface Type]**

This is only an outline, describing your policy's most important features. The policy is your insurance contract. You must read the policy itself to understand all of the rights and duties of both you and your insurance company.

**RIGHT TO RETURN POLICY [Boldface Type]**

If you find that you are not satisfied with your policy, you may return it to [insert issuer's address]. If you send the policy back to us within 30 days after you receive it, we will treat the policy as if it had never been issued and return all of your payments.

**POLICY REPLACEMENT [Boldface Type]**

If you are replacing another health insurance policy, do NOT cancel it until you have actually received your new policy and are sure you want to keep it.

**NOTICE [Boldface Type]**

This policy may not fully cover all of your medical costs.  
[for agents:]

Neither [insert company's name] nor its agents are connected with Medicare.

[for direct response:]

[insert company's name] is not connected with Medicare.

This outline of coverage does not give all the details of Medicare coverage. Contact your local Social Security Office or consult "*The Medicare Handbook*" for more details.

**COMPLETE ANSWERS ARE VERY IMPORTANT [Boldface Type]**

When you fill out the application for the new policy, be sure to answer truthfully and completely all questions about your medical and health history. The company may cancel your policy and refuse to pay any claims if you leave out or falsify important medical information. [If the policy or certificate is guaranteed issue, this paragraph need not appear.]

Review the application carefully before you sign it. Be certain that all information has been properly recorded.

[Include for each plan prominently identified in the cover page, a chart showing the services, Medicare payments, plan payments and insured payments for each plan, using the same language, in the same order, using uniform layout and format as shown in the charts below. No more than four plans may be shown on one chart. For purposes of illustration, charts for each plan are included in this regulation. An issuer may use additional benefit plan designations on these charts pursuant Section 9D of this Regulation.]

[Include an explanation of any innovative benefits on the cover page and in the chart, in a manner approved by the Commissioner.]

**PLAN A**

# FINAL REGULATIONS

## MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD

as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

\*A benefit period begins on the first day you receive service

| SERVICES   | MEDICARE PAYS   | PLAN PAYS  | YOU PAY   |
|--|---|--|---|
| <b>HOSPITALIZATION*</b> Semiprivate room and board, general nursing and miscellaneous service and supplies<br>First 60 days<br>61st thru 90th day<br>91st day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>-Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$[764]<br>All but \$[191] a day<br><br><br>All but \$[382] a day<br><br><br>\$0<br><br><br>\$0 | \$0<br>\$[191] a day<br><br><br>\$[382] a day<br><br><br>100% of Medicare Eligible Expenses<br><br><br>\$0 | \$716 (Part A Deductible)<br>\$0<br><br><br>\$0<br><br><br>\$0**<br><br><br>All Costs |
| <b>SKILLED NURSING FACILITY CARE*</b><br>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br>- First 20 days<br>- 21st thru 100th day<br>- 101st day and after                              | All approved amounts<br>All but \$[95.50] a day<br>\$0  | \$0<br>\$0<br>\$0  | \$0<br>Up to \$[95.50] a day<br>All costs   |
| <b>BLOOD</b><br>First 3 pints<br>Additional  | \$0<br>100%   | 3 pints<br>\$0   | \$0<br>\$0  |
| <b>HOSPICE CARE</b><br>Available as long as your doctor certifies you are terminally ill and you elect to receive these services   | All but very limited coinsurance for outpatient drugs and inpatient respite care                        | \$0  | Balance   |

### PLAN A

**\*\*NOTICE:** When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

## MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR

\*Once you have been billed \$100 of Medicare-Approved amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

| SERVICES   | MEDICARE PAYS                       | PLAN PAYS                           | YOU PAY   |
|--|-------------------------------------|-------------------------------------|---|
| MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUTPATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br>- First 100 days of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts<br>- Part B Excess Charges (Above Medicare Approved Amounts) | \$0<br><br>Generally 80%<br><br>\$0 | \$0<br><br>Generally 20%<br><br>\$0 | \$100 (Part B Deductible)<br><br>\$0<br><br>All Costs |
| BLOOD<br>- First 3 pints<br>- Next \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts   | \$0<br><br>\$0<br><br>80%           | All Costs<br><br>\$0<br><br>20%     | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0       |
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES   | 100%                                | \$0                                 | \$0   |

**PARTS A & B**

| SERVICES  | MEDICARE PAYS              | PLAN PAYS                 | YOU PAY   |
|---|----------------------------|---------------------------|---|
| HOME HEALTH CARE MEDICARE APPROVED SERVICES<br>— Medically necessary skilled care services and medical supplies<br>— Durable medical equipment<br>First \$100 of Medicare Approved Amounts*<br>Remainder of Medicare Approved Amounts | 100%<br><br>\$0<br><br>80% | \$0<br><br>\$0<br><br>20% | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0 |

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

**PLAN B**

**MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD**

| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|
|----------|---------------|-----------|---------|

# FINAL REGULATIONS

|   |  |   |  |
|---|--|---|--|
| <p><b>HOSPITALIZATION*</b><br/>                 Semiprivate room and board, general nursing and miscellaneous service and supplies:<br/>                 First 60 days<br/>                 61<sup>st</sup> thru 90<sup>th</sup> day<br/>                 91<sup>st</sup> day and after:<br/>                 - While using 60 lifetime reserve days<br/>                 - Once lifetime reserve days are used:<br/>                 - Additional 365 days<br/> <br/>                 - Beyond the Additional 365 days</p> | <p>All but \$[764]<br/>                 All but \$[191] a day<br/> <br/>                 All but \$[382] a day<br/> <br/>                 \$0<br/> <br/>                 \$0</p> | <p>\$[764] (Part A Deductible)<br/>                 \$[191] a day<br/> <br/>                 \$[382] a day<br/> <br/>                 100% of Medicare Eligible Expenses<br/> <br/>                 \$0</p> | <p>\$0<br/>                 \$0<br/> <br/>                 \$0<br/> <br/>                 \$0**<br/> <br/>                 All Costs</p> |
| <p><b>SKILLED NURSING FACILITY CARE*</b><br/>                 You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br/>                 - First 20 days<br/>                 - 21<sup>st</sup> thru 100<sup>th</sup> day<br/>                 - 101<sup>st</sup> day and after</p>   | <p>All approved amounts<br/>                 All but \$[95.50] a day<br/>                 \$0</p>  | <p>\$0<br/>                 \$0<br/>                 \$0</p>  | <p>\$0<br/>                 Up to \$[95.50] a day<br/>                 All costs</p>   |
| <p><b>BLOOD</b><br/>                 First 3 pints<br/>                 Additional amounts</p>  | <p>\$0<br/>                 100%</p>   | <p>3 pints<br/>                 \$0</p>   | <p>\$0<br/>                 \$0</p>  |
| <p><b>HOSPICE CARE</b><br/>                 Available as long as your doctor certifies you are terminally ill and you elect to receive these services</p>   | <p>All but very limited coinsurance for out- patient drugs and in-patient respite care</p>   | <p>\$0</p>  | <p>Balance</p>   |

**PLAN B**

**\*\*NOTICE:** When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

**MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR**

\*Once you have been billed \$100 of Medicare-Approved Amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

|          |               |           |         |
|----------|---------------|-----------|---------|
| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|

# FINAL REGULATIONS

2077

|   |                                     |                                     |   |
|---|-------------------------------------|-------------------------------------|---|
| MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUT-PATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br>- First 100 days of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts<br>- Part B Excess Charges (Above Medicare Approved Amounts) | \$0<br><br>Generally 80%<br><br>\$0 | \$0<br><br>Generally 20%<br><br>\$0 | \$100 (Part B Deductible)<br><br>\$0<br><br>All Costs |
| BLOOD<br>- First 3 pints<br>- Next \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts  | \$0<br><br>\$0<br><br>80%           | All Costs<br><br>\$0<br><br>20%     | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0       |
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES  | 100%                                | \$0                                 | \$0   |

## PARTS A & B

| SERVICES  | MEDICARE PAYS              | PLAN PAYS                 | YOU PAY   |
|---|----------------------------|---------------------------|---|
| HOME HEALTH CARE MEDICARE APPROVED SERVICES<br>— Medically necessary skilled care services and medical supplies<br>— Durable medical equipment<br>First \$100 of Medicare Approved Amounts*<br>Remainder of Medicare Approved Amounts | 100%<br><br>\$0<br><br>80% | \$0<br><br>\$0<br><br>20% | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0 |

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

### PLAN C

MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD

# FINAL REGULATIONS

| SERVICES  | MEDICARE PAYS   | PLAN PAYS  | YOU PAY   |
|---|---|--|---|
| <b>HOSPITALIZATION*</b><br>Semiprivate room and board, general nursing and miscellaneous service and supplies:<br>First 60 days<br>61 <sup>st</sup> thru 90 <sup>th</sup> day<br>91 <sup>st</sup> day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>- Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$7[64]<br>All but \$[191] a day<br><br>All but \$3[82] a day<br><br>\$0<br><br>\$0 | \$7[64] (Part A Deductible)<br>\$[191] a day<br><br>\$3[82] a day<br><br>100% of Medicare Eligible Expenses<br><br>\$0 | \$0<br>\$0<br><br>\$0<br><br>\$0**<br><br>All Costs |
| <b>SKILLED NURSING FACILITY CARE*</b><br>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br>- First 20 days<br>- 21 <sup>st</sup> thru 100 <sup>th</sup> day<br>- 101 <sup>st</sup> day and after                                   | All approved amounts<br>All but \$[95.50] a day<br>\$0                                      | \$0<br>Up to \$[95.50] a day<br>\$0  | \$0<br>\$0<br>All costs                             |
| <b>BLOOD</b><br>First 3 pints<br>Additional amounts   | \$0<br>100%   | 3 pints<br>\$0   | \$0<br>\$0  |
| <b>HOSPICE CARE</b><br>Available as long as your doctor certifies you are terminally ill and you elect to receive these services  | All but very limited coinsurance for out-patient drugs and in-patient respite care          | \$0  | Balance   |

\*\*NOTICE: When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

## MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR

\*Once you have been billed \$100 of Medicare-Approved Amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

### PLAN C

| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|
|----------|---------------|-----------|---------|

|   |  |  |  |
|---|--|--|--|
| <p>MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUT-PATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,</p> <ul style="list-style-type: none"> <li>- First 100 days of Medicare Approved Amounts*</li> <li>- Remainder of Medicare Approved Amounts</li> <li>- Part B Excess Charges (Above Medicare Approved Amounts)</li> </ul> | <p>\$0</p> <p>Generally 80%</p> <p>\$0</p> | <p>\$100 (Part B deductible)</p> <p>Generally 20%</p> <p>\$0</p> | <p>\$0</p> <p>\$0</p> <p>All Costs</p> |
| <p>BLOOD</p> <ul style="list-style-type: none"> <li>- First 3 pints</li> <li>- Next \$100 of Medicare Approved Amounts*</li> <li>- Remainder of Medicare Approved Amounts</li> </ul>  | <p>\$0</p> <p>\$0</p> <p>80%</p>           | <p>All Costs</p> <p>\$100 (Part B deductible)</p> <p>20%</p>     | <p>\$0</p> <p>\$0</p> <p>\$0</p>       |
| <p>CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES</p>   | <p>100%</p>                                | <p>\$0</p>   | <p>\$0</p>                             |

### PARTS A & B

| SERVICES   | MEDICARE PAYS         | PLAN PAYS                                   | YOU PAY               |
|--|-----------------------|---|-----------------------|
| <p>HOME HEALTH CARE MEDICARE APPROVED SERVICES</p> <ul style="list-style-type: none"> <li>— Medically necessary skilled care services and medical supplies</li> <li>— Durable medical equipment</li> </ul> | <p>100%</p>           | <p>\$0</p>                                  | <p>\$0</p>            |
| <p>First \$100 of Medicare Approved Amounts*</p> <p>Remainder of Medicare Approved Amounts</p>   | <p>\$0</p> <p>80%</p> | <p>\$100 (Part B deductible)</p> <p>20%</p> | <p>\$0</p> <p>\$0</p> |

OTHER BENEFITS — NOT COVERED BY MEDICARE

|  |            |  |   |
|--|------------|--|---|
| FOREIGN TRAVEL — NOT COVERED BY MEDICARE Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA<br>- First \$250 each calendar year<br>- Remainder of Charges | \$0<br>\$0 | \$0<br>80% to a lifetime maximum benefit of \$50,000 | \$250<br>20% and amounts over the \$50,000 lifetime maximum |
|--|------------|--|---|

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

PLAN D

MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD

| SERVICES   | MEDICARE PAYS   | PLAN PAYS  | YOU PAY   |
|--|---|--|---|
| HOSPITALIZATION* Semiprivate room and board, general nursing and miscellaneous service and supplies<br>First 60 days<br>61st thru 90th day<br>91st day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>- Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$[764]<br>All but \$[191] a day<br><br>All but \$[382] a day<br><br>\$0<br><br>\$0 | \$[764] (Part A Deductible)<br>\$[191] a day<br><br>\$[382] a day<br><br>100% of Medicare Eligible Expenses<br><br>\$0 | \$0<br>\$0<br><br>\$0<br><br>\$0**<br><br>All Costs |
| SKILLED NURSING FACILITY CARE*<br>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br>- First 20 days<br>- 21st thru 100th day<br>- 101st day and after                               | All approved amounts<br>All but \$[95.50] a day<br>\$0                                      | \$0<br>Up to \$[95.50] a day<br>\$0  | \$0<br>\$0<br>All costs                             |
| BLOOD<br>First 3 pints<br>Additional amounts   | \$0<br>100%   | 3 pints<br>\$0   | \$0<br>\$0  |

# FINAL REGULATIONS

2081

|   |  |     |         |
|---|--|-----|---------|
| HOSPICE CARE<br>Available as long as your doctor certifies you are terminally ill and you elect to receive these services | All but very limited coinsurance for out-patient drugs and in-patient respite care | \$0 | Balance |
|---|--|-----|---------|

**\*\*NOTICE:** When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

## MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR

\*Once you have been billed \$100 of Medicare-Approved amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

### PLAN D

| SERVICES  | MEDICARE PAYS                       | PLAN PAYS                           | YOU PAY   |
|---|-------------------------------------|-------------------------------------|---|
| MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUT-PATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br>- First 100 days of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts<br>- Part B Excess Charges (Above Medicare Approved Amounts) | \$0<br><br>Generally 80%<br><br>\$0 | \$0<br><br>Generally 20%<br><br>\$0 | \$100 (Part B Deductible)<br><br>\$0<br><br>All Costs |
| BLOOD<br>- First 3 pints<br>- Next \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts  | \$0<br><br>\$0<br><br>80%           | All Costs<br><br>\$0<br><br>20%     | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0       |
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES  | 100%                                | \$0                                 | \$0   |

### PARTS A & B

| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|
|----------|---------------|-----------|---------|

# FINAL REGULATIONS

|  |                                   |   |  |
|--|-----------------------------------|---|--|
| <p>HOME HEALTH CARE MEDICARE APPROVED SERVICES</p> <ul style="list-style-type: none"> <li>— Medically necessary skilled care services and medical supplies</li> <li>— Durable medical equipment                             <ul style="list-style-type: none"> <li>- First \$100 of Medicare Approved Amounts*</li> <li>- Remainder of Medicare Approved Amounts</li> </ul> </li> </ul>  | <p>100%</p> <p>\$0</p> <p>80%</p> | <p>\$0</p> <p>\$0</p> <p>20%</p>  | <p>\$0</p> <p>\$100 (Part B Deductible)</p> <p>\$0</p> |
| <p>AT-HOME RECOVERY SERVICES — NOT COVERED BY MEDICARE</p> <p>Home care certified by your doctors, for personal care during recovery from an injury or sickness for which Medicare approved a Home Care Treatment Plan</p> <ul style="list-style-type: none"> <li>— Benefit for each visit</li> <li>— Number of visits covered (must be received within 8 weeks of last Medicare Approved visit)</li> <li>— Calendar year maximum</li> </ul> | <p>\$0</p> <p>\$0</p> <p>\$0</p>  | <p>Actual Charges to \$40 a visit</p> <p>Up to the number of Medicare Approved visits, not to exceed 7 each week</p> <p>\$1,600</p> | <p>Balance</p>   |

**OTHER BENEFITS — NOT COVERED BY MEDICARE**

|   |                       |   |  |
|---|-----------------------|---|--|
| <p>FOREIGN TRAVEL — NOT COVERED BY MEDICARE</p> <p>Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA</p> <ul style="list-style-type: none"> <li>- First \$250 each calendar year</li> <li>- Remainder of Charges</li> </ul> | <p>\$0</p> <p>\$0</p> | <p>\$0</p> <p>80% to a lifetime maximum benefit of \$50,000</p> | <p>\$250</p> <p>20% and amounts over the \$50,000 lifetime maximum</p> |
|---|-----------------------|---|--|

**PLAN E**

**MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD**

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|
|----------|---------------|-----------|---------|

# FINAL REGULATIONS

2083

|  |   |   |  |
|--|---|---|--|
| <p>HOSPITALIZATION* Semiprivate room and board, general nursing and miscellaneous service and supplies</p> <p>First 60 days<br/>61st thru 90th day<br/>91st day and after:</p> <ul style="list-style-type: none"> <li>- While using 60 lifetime reserve days</li> <li>- Once lifetime reserve days are used:</li> <li>- Additional 365 days</li> <br/> <li>- Beyond the Additional 365 days</li> </ul> | <p>All but \$[764<br/>All but \$[191] a day</p><br><p>All but \$[382] a day</p><br><p>\$0</p><br><p>\$0</p> | <p>\$[764] (Part A Deductible)<br/>\$[191] a day</p><br><p>\$[382] a day</p><br><p>100% of Medicare Eligible Expenses<br/>\$0</p> | <p>\$0<br/>\$0<br/>\$0</p><br><p>\$0**</p><br><p>All Costs</p> |
| <p>SKILLED NURSING FACILITY CARE*</p> <p>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital</p> <ul style="list-style-type: none"> <li>- First 20 days</li> <li>- 21st thru 100th day</li> <li>- 101st day and after</li> </ul>   | <p>All approved amounts<br/>All but \$[95.50] a day<br/>\$0</p>   | <p>\$0<br/>Up to \$[95.50] a day<br/>\$0</p>  | <p>\$0<br/>\$0<br/>All costs</p>                               |
| <p>BLOOD</p> <p>First 3 pints<br/>Additional amounts</p>   | <p>\$0<br/>100%</p>   | <p>3 pints<br/>\$0</p>  | <p>\$0<br/>\$0</p>   |
| <p>HOSPICE CARE</p> <p>Available as long as your doctor certifies you are terminally ill and you elect to receive these services</p>   | <p>All but very limited coinsurance for out-patient drugs and in-patient respite care</p>                   | <p>\$0</p>  | <p>Balance</p>   |

PLAN E

**\*\*NOTICE:** When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR

\*Once you have been billed \$100 of Medicare Approved Amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|
|----------|---------------|-----------|---------|

**FINAL REGULATIONS**

|   |  |  |  |
|---|--|--|--|
| <p>MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUTPATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br/>                     - First 100 days of Medicare Approved Amounts*<br/>                     - Remainder of Medicare Approved Amounts<br/>                     - Part B Excess Charges (Above Medicare Approved Amounts)</p> | <p>\$0<br/><br/>Generally 80%<br/><br/>\$0</p> | <p>\$0<br/><br/>Generally 20%<br/><br/>\$0</p> | <p>\$100 (Part B Deductible)<br/><br/>\$0<br/><br/>All Costs</p> |
| <p>BLOOD<br/>                     - First 3 pints<br/>                     - Next \$100 of Medicare Approved Amounts*<br/>                     - Remainder of Medicare Approved Amounts</p>   | <p>\$0<br/><br/>\$0<br/><br/>80%</p>           | <p>All Costs<br/><br/>\$0<br/><br/>20%</p>     | <p>\$0<br/><br/>\$100 (Part B Deductible)<br/><br/>\$0</p>       |
| <p>CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES</p>   | <p>100%</p>                                    | <p>\$0</p>                                     | <p>\$0</p>   |

**PARTS A & B**

| SERVICES   | MEDICARE PAYS                         | PLAN PAYS                            | YOU PAY  |
|--|---------------------------------------|--------------------------------------|--|
| <p>HOME HEALTH CARE MEDICARE APPROVED SERVICES<br/>                     — Medically necessary skilled care services and medical supplies<br/>                     — Durable medical equipment<br/>                     - First \$100 of Medicare Approved Amounts*<br/>                     - Remainder of Medicare Approved Amounts</p> | <p>100%<br/><br/>\$0<br/><br/>80%</p> | <p>\$0<br/><br/>\$0<br/><br/>20%</p> | <p>\$0<br/><br/>\$100 (Part B Deductible)<br/><br/>\$0</p> |

(continued)

**OTHER BENEFITS — NOT COVERED BY MEDICARE**

\* Medicare benefits are subject to change. Please consult the

| SERVICES  | MEDICARE PAYS | PLAN PAYS  | YOU PAY   |
|---|---------------|--|---|
| <b>FOREIGN TRAVEL — NOT COVERED BY MEDICARE</b><br>Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA<br>- First \$250 each calendar year<br>- Remainder of Charges  | \$0<br>\$0    | \$0<br>80% to a lifetime maximum benefit of \$50,000 | \$250<br>20% and amounts over the \$50,000 lifetime maximum |
| <b>*PREVENTIVE MEDICAL CARE BENEFIT — NOT COVERED BY MEDICARE</b><br>Some annual physical and preventive tests and services such as: <del>fecal occult blood test,</del> digital rectal exam, <del>mammogram,</del> hearing screening, dipstick urinalysis, diabetes screening, thyroid function test, <del>influenza shot,</del> tetanus and diphtheria booster and education, administered or ordered by your doctor when not covered by Medicare<br>- First \$120 each calendar year<br>- Additional charges | \$0<br>\$0    | \$120<br>\$0   | \$0<br>All Costs  |

latest *Guide to Health Insurance for People with Medicare.*

**PLAN F or HIGH DEDUCTIBLE PLAN F**

**MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD**

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other

facility for 60 days in a row.

\*\*This high deductible plan pays the same or offers the same benefits as Plan F after one has paid a calendar year [\$1500] deductible. Benefits from the high deductible plan F will not begin until out-of-pocket expenses are [\$1500]. Out-of-pocket expenses for this deductible are expenses that would ordinarily be paid by the policy. This includes the Medicare deductibles for Part A and Part B, but does not include the plan's separate foreign travel emergency deductible.

| SERVICES  | MEDICARE PAYS   | AFTER YOU PAY \$1500 DEDUCTIBLE,** PLAN PAYS   | IN ADDITION TO \$1500 DEDUCTIBLE,** YOU PAY     |
|---|---|--|---|
| <b>HOSPITALIZATION*</b> Semiprivate room and board, general nursing and miscellaneous service and supplies<br>First 60 days<br>61st thru 90th day<br>91st day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>- Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$[764]<br>All but \$[191] a day<br><br>All but \$[382] a day<br><br>\$0<br>\$0 | \$[764] (Part A Deductible)<br>\$[191] a day<br><br>\$[382] a day<br><br>100% of Medicare Eligible Expenses<br>\$0 | \$0<br>\$0<br><br>\$0<br><br>\$0**<br>All Costs |

# FINAL REGULATIONS

|  |   |  |  |
|--|---|--|--|
| <p>SKILLED NURSING FACILITY CARE*</p> <p>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital</p> <ul style="list-style-type: none"> <li>- First 20 days</li> <li>- 21st thru 100th day</li> <li>- 101st day and after</li> </ul> | <p>All approved amounts</p> <p>All but \$[95.50] a day</p> <p>\$0</p>                     | <p>\$0</p> <p>Up to \$[95.50] a day</p> <p>\$0</p> | <p>\$0</p> <p>\$0</p> <p>All costs</p> |
| <p>BLOOD</p> <p>First 3 pints</p> <p>Additional amounts</p>  | <p>\$0</p> <p>100%</p>  | <p>3 pints</p> <p>\$0</p>                          | <p>\$0</p> <p>\$0</p>                  |
| <p>HOSPICE CARE</p> <p>Available as long as your doctor certifies you are terminally ill and you elect to receive these services</p>   | <p>All but very limited coinsurance for out-patient drugs and in-patient respite care</p> | <p>\$0</p>   | <p>Balance</p>                         |

\*\*NOTICE: When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

**\*\*This high deductible plan pays the same or offers the same benefits as Plan F after one has paid a calendar year [\$1500] deductible. Benefits from the high deductible plan F will not begin until out-of-pocket expenses are [\$1500]. Out-of-pocket expenses for this deductible are expenses that would ordinarily be paid by the policy. This includes the Medicare deductibles for Part A and Part B, but does not include the plan's separate foreign travel emergency deductible.**

PLAN F or HIGH DEDUCTIBLE PLAN F

MEDICARE (PART B) — HOSPITAL SERVICES — PER BENEFIT PERIOD

|          |               |  |  |
|----------|---------------|--|--|
| SERVICES | MEDICARE PAYS | AFTER YOU PAY \$1500 DEDUCTIBLE,** PLAN PAYS | AFTER YOU PAY \$1500 DEDUCTIBLE,** YOU PAY |
|----------|---------------|--|--|

# FINAL REGULATIONS

2087

|   |                                     |  |                           |
|---|-------------------------------------|--|---------------------------|
| MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUT-PATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br>- First 100 days of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts<br>- Part B Excess Charges (Above Medicare Approved Amounts) | \$0<br><br>Generally 80%<br><br>\$0 | \$100 (Part B Deductible)<br><br>Generally 20%<br><br>100% | \$0<br><br>\$0<br><br>\$0 |
| BLOOD<br>- First 3 pints<br>- Next \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts  | \$0<br><br>\$0<br><br>80%           | All Costs<br><br>\$100 (Part B Deductible)<br><br>20%      | \$0<br><br>\$0<br><br>\$0 |
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES  | 100%                                | \$0  | \$0                       |

(continued)

## PARTS A & B

### PLAN F or HIGH DEDUCTIBLE PLAN F (cont.)

| SERVICES  | MEDICARE PAYS              | AFTER YOU PAY \$1500 DEDUCTIBLE,** PLAN PAYS    | AFTER YOU PAY \$1500 DEDUCTIBLE,** YOU PAY |
|---|----------------------------|---|--|
| HOME HEALTH CARE MEDICARE APPROVED SERVICES<br>— Medically necessary skilled care services and medical supplies<br>— Durable medical equipment<br>- First \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts | 100%<br><br>\$0<br><br>80% | \$0<br><br>\$100 (Part B Deductible)<br><br>20% | \$0<br><br>\$0<br><br>\$0                  |

OTHER BENEFITS — NOT COVERED BY MEDICARE

# FINAL REGULATIONS

| SERVICES  | MEDICARE PAYS  | AFTER YOU PAY \$1500 DEDUCTIBLE,** PLAN PAYS             | AFTER YOU PAY \$1500 DEDUCTIBLE,** YOU PAY                      |
|---|----------------|--|---|
| FOREIGN TRAVEL — NOT COVERED BY MEDICARE<br>Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA<br>- First \$250 each calendar year<br><br>- Remainder of Charges | \$0<br><br>\$0 | \$0<br><br>80% to a lifetime maximum benefit of \$50,000 | \$250<br><br>20% and amounts over the \$50,000 lifetime maximum |

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

PLAN G

MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD

| SERVICES   | MEDICARE PAYS   | PLAN PAYS  | YOU PAY   |
|--|---|--|---|
| HOSPITALIZATION* Semiprivate room and board, general nursing and miscellaneous service and supplies<br>First 60 days<br>61st thru 90th day<br>91st day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>- Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$[764]<br>All but \$[191] a day<br><br>All but \$[382] a day<br><br>\$0<br><br>\$0 | \$[764] (Part A Deductible)<br>\$[191] a day<br><br>\$[382] a day<br><br>100% of Medicare Eligible Expenses<br>\$0 | \$0<br>\$0<br><br>\$0<br><br>\$0**<br><br>All Costs |
| SKILLED NURSING FACILITY CARE*<br>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br>- First 20 days<br>- 21st thru 100th day<br>- 101st day and after                               | All approved amounts<br>All but \$[95.50] a day<br>\$0                                      | \$0<br>Up to \$[95.50] a day<br>\$0  | \$0<br>\$0<br>All costs                             |

# FINAL REGULATIONS

2089

|   |  |                |            |
|---|--|----------------|------------|
| BLOOD<br>First 3 pints<br>Additional amounts  | \$0<br>100%  | 3 pints<br>\$0 | \$0<br>\$0 |
| HOSPICE CARE<br>Available as long as your doctor certifies you are terminally ill and you elect to receive these services | All but very limited coinsurance for out-patient drugs and in-patient respite care | \$0            | Balance    |

PLAN G

\*\*NOTICE: When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR

\*Once you have been billed \$100 of Medicare Approved Amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

| SERVICES  | MEDICARE PAYS                       | PLAN PAYS                           | YOU PAY   |
|---|-------------------------------------|-------------------------------------|---|
| MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUT-PATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br>- First 100 days of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts<br>- Part B Excess Charges (Above Medicare Approved Amounts) | \$0<br><br>Generally 80%<br><br>\$0 | \$0<br><br>Generally 20%<br><br>80% | \$100 (Part B Deductible)<br><br>\$0<br><br>20% |
| BLOOD<br>- First 3 pints<br>- Next \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts  | \$0<br><br>\$0<br><br>80%           | All Costs<br><br>\$0<br><br>20%     | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0 |
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES  | 100%                                | \$0                                 | \$0   |

(continued)

PARTS A & B

# FINAL REGULATIONS

| SERVICES  | MEDICARE PAYS              | PLAN PAYS  | YOU PAY   |
|---|----------------------------|--|---|
| <b>HOME HEALTH CARE MEDICARE APPROVED SERVICES</b><br>— Medically necessary skilled care services and medical supplies<br>— Durable medical equipment<br>- First \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts  | 100%<br><br>\$0<br><br>80% | \$0<br><br>\$0<br><br>20%  | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0 |
| <b>AT-HOME RECOVERY SERVICES — NOT COVERED BY MEDICARE</b><br>Home care certified by your doctors, for personal care during recovery from an injury or sickness for which Medicare approved a Home Care Treatment Plan<br>— Benefit for each visit<br><br>— Number of visits covered (must be received within 8 weeks of last Medicare Approved visit)<br><br>— Calendar year maximum | \$0<br><br>\$0<br><br>\$0  | Actual Charges to \$40 a visit<br><br>Up to the number of Medicare Approved visits, not to exceed 7 each week<br><br>\$1,600 | Balance   |

**OTHER BENEFITS — NOT COVERED BY MEDICARE**

| SERVICES  | MEDICARE PAYS  | PLAN PAYS  | YOU PAY   |
|---|----------------|--|---|
| <b>FOREIGN TRAVEL — NOT COVERED BY MEDICARE</b><br>Medically necessary emer-gency care services beginning during the first 60 days of each trip outside the USA<br>- First \$250 each calendar year<br><br>- Remainder of Charges | \$0<br><br>\$0 | \$0<br><br>80% to a lifetime maximum benefit of \$50,000 | \$250<br><br>20% and amounts over the \$50,000 lifetime maximum |

**PLAN H**

**MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD**

as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

\*A benefit period begins on the first day you receive service

| SERVICES  | MEDICARE PAYS   | PLAN PAYS  | YOU PAY   |
|---|---|--|---|
| <b>HOSPITALIZATION*</b> Semiprivate room and board, general nursing and miscellaneous service and supplies<br>First 60 days<br>61st thru 90th day<br>91st day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>- Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$[764]<br>All but \$[191] a day<br><br>All but \$[382] a day<br><br>\$0<br><br>\$0 | \$[764] (Part A Deductible)<br>\$[191] a day<br><br>\$[382] a day<br><br>100% of Medicare Eligible Expenses<br>\$0 | \$0<br>\$0<br><br>\$0<br><br>\$0**<br><br>All Costs |
| <b>SKILLED NURSING FACILITY CARE*</b><br>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br>- First 20 days<br>- 21st thru 100th day<br>- 101st day and after                               | All approved amounts<br>All but \$[95.50] a day<br>\$0                                      | \$0<br>Up to \$[95.50] a day<br>\$0  | \$0<br>\$0<br>All costs                             |
| <b>BLOOD</b><br>First 3 pints<br>Additional amounts   | \$0<br>100%   | 3 pints<br>\$0   | \$0<br>\$0  |
| <b>HOSPICE CARE</b><br>Available as long as your doctor certifies you are terminally ill and you elect to receive these services  | All but very limited coinsurance for out-patient drugs and in-patient respite care          | \$0  | Balance   |

**PLAN H**

**\*\*NOTICE:** When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

**MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR**

\*Once you have been billed \$100 of Medicare Approved Amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|
|----------|---------------|-----------|---------|

**FINAL REGULATIONS**

|  |                                     |                                     |   |
|--|-------------------------------------|-------------------------------------|---|
| MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUTPATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br>- First 100 days of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts<br>- Part B Excess Charges (Above Medicare Approved Amounts) | \$0<br><br>Generally 80%<br><br>\$0 | \$0<br><br>Generally 20%<br><br>\$0 | \$100 (Part B Deductible)<br><br>\$0<br><br>All Costs |
| BLOOD<br>- First 3 pints<br>- Next \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts   | \$0<br><br>\$0<br><br>80%           | All Costs<br><br>\$0<br><br>20%     | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0       |
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES   | 100%                                | \$0                                 | \$0   |

PARTS A & B

| SERVICES  | MEDICARE PAYS              | PLAN PAYS                 | YOU PAY   |
|---|----------------------------|---------------------------|---|
| HOME HEALTH CARE MEDICARE APPROVED SERVICES<br>— Medically necessary skilled care services and medical supplies<br>— Durable medical equipment<br>- First \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts | 100%<br><br>\$0<br><br>80% | \$0<br><br>\$0<br><br>20% | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0 |

(continued)

OTHER BENEFITS — NOT COVERED BY MEDICARE

PLAN H (continued)

| SERVICES | MEDICARE PAYS | PLAN PAYS | YOU PAY |
|----------|---------------|-----------|---------|
|----------|---------------|-----------|---------|

# FINAL REGULATIONS

2093

|   |                       |   |   |
|---|-----------------------|---|---|
| FOREIGN TRAVEL — NOT COVERED BY MEDICARE<br>Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA<br>- First \$250 each calendar year<br><br>- Remainder of Charges | \$0<br><br>\$0        | \$0<br><br>80% to a lifetime maximum benefit of \$50,000  | \$250<br><br>20% and amounts over the \$50,000 lifetime maximum |
| BASIC OUTPATIENT PRESCRIPTION DRUGS — NOT COVERED BY MEDICARE<br>- First \$250 each calendar year<br>- Next \$2,500 each calendar year<br>- Over \$2,500 each calendar year   | \$0<br>\$0<br><br>\$0 | \$0<br>50% — \$1,250 calendar year maximum benefit<br>\$0 | \$250<br>50%<br><br>All Costs                                   |

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

PLAN I

MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD

| SERVICES   | MEDICARE PAYS   | PLAN PAYS  | YOU PAY   |
|--|---|--|---|
| HOSPITALIZATION* Semiprivate room and board, general nursing and miscellaneous service and supplies<br>First 60 days<br>61st thru 90th day<br>91st day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>- Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$[764]<br>All but \$[191] a day<br><br>All but \$[382] a day<br><br>\$0<br><br>\$0 | \$[764] (Part A Deductible)<br>\$[191] a day<br><br>\$[382] a day<br><br>100% of Medicare Eligible Expenses<br><br>\$0 | \$0<br>\$0<br><br>\$0<br><br>\$0**<br><br>All Costs |

# FINAL REGULATIONS

|  |   |  |  |
|--|---|--|--|
| <p><b>SKILLED NURSING FACILITY CARE*</b><br/>                 You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br/>                 - First 20 days<br/>                 - 21st thru 100th day<br/>                 - 101st day and after</p> | <p>All approved amounts<br/>                 All but \$[95.50] a day<br/>                 \$0</p> | <p>\$0<br/>                 Up to \$[95.50] a day<br/>                 \$0</p> | <p>\$0<br/>                 \$0<br/>                 All costs</p> |
| <p><b>BLOOD</b><br/>                 First 3 pints<br/>                 Additional amounts</p>   | <p>\$0<br/>                 100%</p>  | <p>3 pints<br/>                 \$0</p>  | <p>\$0<br/>                 \$0</p>                                |
| <p><b>HOSPICE CARE</b><br/>                 Available as long as your doctor certifies you are terminally ill and you elect to receive these services</p>  | <p>All but very limited coinsurance for out- patient drugs and in- patient respite care</p>       | <p>\$0</p>   | <p>Balance</p>   |

**\*\*NOTICE:** When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

**MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR**

\*Once you have been billed \$100 of Medicare-Approved Amounts for covered services (which are noted with an asterisk), your Part B Deductible will have been met for the calendar year.

**PLAN I**

| SERVICES  | MEDICARE PAYS  | PLAN PAYS   | YOU PAY  |
|---|--|---|--|
| <p><b>MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUT-PATIENT TREATMENT,</b> such as Physician's services, in-patient and out-patient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br/>                     - First 100 days of Medicare Approved Amounts*<br/>                     - Remainder of Medicare Approved Amounts<br/>                     - Part B Excess Charges (Above Medicare Approved Amounts)</p> | <p>\$0<br/><br/>                     Generally 80%<br/><br/>                     \$0</p> | <p>\$0<br/><br/>                     Generally 20%<br/><br/>                     100%</p> | <p>\$100 (Part B Deductible)<br/><br/>                     \$0<br/><br/>                     \$0</p> |
| <p><b>BLOOD</b><br/>                     - First 3 pints<br/>                     - Next \$100 of Medicare Approved Amounts*<br/>                     - Remainder of Medicare Approved Amounts</p>  | <p>\$0<br/>                     \$0<br/><br/>                     80%</p>                | <p>All Costs<br/>                     \$0<br/><br/>                     20%</p>           | <p>\$0<br/>                     \$100 (Part B Deductible)<br/><br/>                     \$0</p>      |

# FINAL REGULATIONS

2095

|  |      |     |     |
|--|------|-----|-----|
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES | 100% | \$0 | \$0 |
|--|------|-----|-----|

(continued)

PARTS A & B

PLAN I (continued)

| SERVICES   | MEDICARE PAYS              | PLAN PAYS  | YOU PAY   |
|--|----------------------------|--|---|
| HOME HEALTH CARE MEDICARE APPROVED SERVICES<br>— Medically necessary skilled care services and medical supplies<br>— Durable medical equipment<br>- First \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts  | 100%<br><br>\$0<br><br>80% | \$0<br><br>\$0<br><br>20%  | \$0<br><br>\$100 (Part B Deductible)<br><br>\$0 |
| AT-HOME RECOVERY SERVICES — NOT COVERED BY MEDICARE<br>Home care certified by your doctors, for personal care during recovery from an injury or sickness for which Medicare approved a Home Care Treatment Plan<br>— Benefit for each visit<br><br>— Number of visits covered (must be received within 8 weeks of last Medicare Approved visit)<br><br>— Calendar year maximum | \$0<br><br>\$0<br><br>\$0  | Actual Charges to \$40 a visit<br><br>Up to the number of Medicare Approved visits, not to exceed 7 each week<br><br>\$1,600 | Balance   |

OTHER BENEFITS — NOT COVERED BY MEDICARE

| SERVICES   | MEDICARE PAYS     | PLAN PAYS   | YOU PAY   |
|--|-------------------|---|---|
| FOREIGN TRAVEL — NOT COVERED BY MEDICARE<br>Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA<br>- First \$250 each calendar year<br>- Remainder of Charges* | \$0<br>\$0        | \$0<br>80% to a lifetime maximum benefit of \$50,000      | \$250<br>20% and amounts over the \$50,000 lifetime maximum |
| BASIC OUTPATIENT PRESCRIPTION DRUGS — NOT COVERED BY MEDICARE<br>- First \$250 each calendar year<br>- Next \$2,500 each calendar year<br>- Over \$2,500 each calendar year  | \$0<br>\$0<br>\$0 | \$0<br>50% — \$1,250 calendar year maximum benefit<br>\$0 | \$250<br>50%<br>All Costs                                   |

PLAN J or HIGH DEDUCTIBLE PLAN J

MEDICARE (PART A) — HOSPITAL SERVICES — PER BENEFIT PERIOD

# FINAL REGULATIONS

\*A benefit period begins on the first day you receive service as an inpatient in a hospital and ends after you have been out of the hospital and have not received skilled care in any other facility for 60 days in a row.

\*\*This high deductible plan pays the same or offers the same benefits as Plan J after one has paid a calendar year [\$1500] deductible. Benefits from high deductible plan J will not

begin until out-of-pocket expenses are [\$1500]. Out-of-pocket expenses for this deductible are expenses that would ordinarily be paid by the policy. This includes the Medicare deductibles for Part A and Part B, but does not include the plan's separate prescription drug deductible or the plan's separate foreign travel emergency deductible.

| SERVICES   | MEDICARE PAYS   | <u>AFTER YOU PAY \$1500 DEDUCTIBLE **</u><br>PLAN PAYS   | <u>IN ADDITION TO \$1500 DEDUCTIBLE,** YOU PAY</u>  |
|--|---|--|---|
| <b>HOSPITALIZATION*</b><br>Semiprivate room and board, general nursing and miscellaneous service and supplies<br>First 60 days<br>61st thru 90th day<br>91st day and after:<br>- While using 60 lifetime reserve days<br>- Once lifetime reserve days are used:<br>- Additional 365 days<br><br>- Beyond the Additional 365 days | All but \$[764]<br>All but \$[191] a day<br><br>All but \$[382] a day<br><br>\$0<br><br>\$0 | \$[764] (Part A Deductible)<br>\$[191] a day<br><br>\$[382] a day<br><br>100% of Medicare Eligible Expenses<br><br>\$0 | \$0<br>\$0<br><br>\$0<br><br>\$0**<br><br>All Costs |
| <b>SKILLED NURSING FACILITY CARE*</b><br>You must meet Medicare's requirements, including having been in a hospital for at least 3 days and entered a Medicare-approved facility within 30 days after leaving the hospital<br>- First 20 days<br>- 21st thru 100th day<br>- 101st day and after                                  | All approved amounts<br>All but \$[95.50] a day<br>\$0                                      | \$0<br>Up to \$[95.50] a day<br>\$0  | \$0<br>\$0<br>All costs                             |
| <b>BLOOD</b><br>First 3 pints<br>Additional amounts  | \$0<br>100%   | 3 pints<br>\$0   | \$0<br>\$0  |
| <b>HOSPICE CARE</b><br>Available as long as your doctor certifies you are terminally ill and you elect to receive these services   | All but very limited coinsurance for out-patient drugs and in-patient respite care          | \$0  | Balance   |

\*\*NOTICE: When your Medicare Part A hospital benefits are exhausted, the insurer stands in the place of Medicare and will pay whatever amount Medicare would have paid for up to an additional 365 days as provided in the policy's "Core Benefits." During this time the hospital is prohibited

from billing you for the balance based on any difference between its billed charges and the amount Medicare would have paid.

PLAN J

# FINAL REGULATIONS

2097

MEDICARE (PART B) — MEDICAL SERVICES — PER CALENDAR YEAR

asterisk), your Part B Deductible will have been met for the calendar year.

\*Once you have been billed \$100 of Medicare-Approved Amounts for covered services (which are noted with an

| SERVICES  | MEDICARE PAYS                       | <u>AFTER YOU PAY \$1500 DEDUCTIBLE,**</u><br>PLAN PAYS     | <u>AFTER YOU PAY \$1500 DEDUCTIBLE,**</u><br>YOU PAY |
|---|-------------------------------------|--|--|
| MEDICAL EXPENSES — IN OR OUT OF THE HOSPITAL AND OUT-PATIENT TREATMENT, such as Physician's services, inpatient and outpatient medical and surgical services and supplies, physical and speech therapy, diagnostic tests, durable medical equipment,<br>- First 100 days of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts<br>- Part B Excess Charges (Above Medicare Approved Amounts) | \$0<br><br>Generally 80%<br><br>\$0 | \$100 (Part B Deductible)<br><br>Generally 20%<br><br>100% | \$0<br><br>\$0<br><br>\$0                            |
| BLOOD<br>- First 3 pints<br>- Next \$100 of Medicare Approved Amounts*<br>- Remainder of Medicare Approved Amounts  | \$0<br>\$0<br><br>80%               | All Costs<br>\$100 (Part B Deductible)<br><br>20%          | \$0<br>\$0<br><br>\$0                                |
| CLINICAL LABORATORY SERVICES — BLOOD TESTS FOR DIAGNOSTIC SERVICES  | 100%                                | \$0  | \$0  |

(continued)

PARTS A & B

PLAN J or HIGH DEDUCTIBLE PLAN J (cont.)

| SERVICES | MEDICARE PAYS | <u>AFTER YOU PAY \$1500 DEDUCTIBLE,**</u><br>PLAN PAYS | <u>AFTER YOU PAY \$1500 DEDUCTIBLE,**</u><br>YOU PAY |
|----------|---------------|--|--|
|          |               |  |  |

# FINAL REGULATIONS

|   |                                   |   |                                  |
|---|-----------------------------------|---|----------------------------------|
| <p>HOME HEALTH CARE<br/>MEDICARE APPROVED<br/>SERVICES</p> <p>— Medically necessary skilled care services and medical supplies</p> <p>— Durable medical equipment</p> <p style="margin-left: 20px;">- First \$100 of Medicare Approved Amounts*</p> <p style="margin-left: 20px;">- Remainder of Medicare Approved Amounts</p>  | <p>100%</p> <p>\$0</p> <p>80%</p> | <p>\$0</p> <p>\$100 (Part B Deductible)</p> <p>20%</p>  | <p>\$0</p> <p>\$0</p> <p>\$0</p> |
| <p>AT-HOME RECOVERY SERVICES — NOT COVERED BY MEDICARE</p> <p>Home care certified by your doctors, for personal care during recovery from an injury or sickness for which Medicare approved a Home Care Treatment Plan</p> <p>— Benefit for each visit</p> <p>— Number of visits covered (must be received within 8 weeks of last Medicare Approved visit)</p> <p>— Calendar year maximum</p> | <p>\$0</p> <p>\$0</p> <p>\$0</p>  | <p>Actual Charges to \$40 a visit</p> <p>Up to the number of Medicare Approved visits, not to exceed 7 each week</p> <p>\$1,600</p> | <p>Balance</p>                   |

(continued)

OTHER BENEFITS—NOT COVERED BY MEDICARE

PLAN J or HIGH DEDUCTIBLE PLAN J (cont.)

| SERVICES   | MEDICARE PAYS                    | AFTER YOU PAY \$1500 DEDUCTIBLE,** PLAN PAYS                             | AFTER YOU PAY \$1500 DEDUCTIBLE,** YOU PAY                             |
|--|----------------------------------|--|--|
| <p>FOREIGN TRAVEL — NOT COVERED BY MEDICARE</p> <p>Medically necessary emergency care services beginning during the first 60 days of each trip outside the USA</p> <p style="margin-left: 20px;">- First \$250 each calendar year</p> <p style="margin-left: 20px;">- Remainder of Charges</p> | <p>\$0</p> <p>\$0</p>            | <p>\$0</p> <p>80% to a lifetime maximum benefit of \$50,000</p>          | <p>\$250</p> <p>20% and amounts over the \$50,000 lifetime maximum</p> |
| <p>EXTENDED OUTPATIENT PRESCRIPTION DRUGS — NOT COVERED BY MEDICARE</p> <p style="margin-left: 20px;">- First \$250 each calendar year</p> <p style="margin-left: 20px;">- Next \$6,000 each calendar year</p> <p style="margin-left: 20px;">- Over \$6,000 each calendar year</p>             | <p>\$0</p> <p>\$0</p> <p>\$0</p> | <p>\$0</p> <p>50% — \$3,000 calendar year maximum benefit</p> <p>\$0</p> | <p>\$250</p> <p>50%</p> <p>All Costs</p>                               |

|  |                    |                      |                          |
|--|--------------------|----------------------|--------------------------|
| <p>***PREVENTIVE MEDICAL CARE BENEFIT — NOT COVERED BY MEDICARE</p> <p>Some annual physical and preventive tests and services such as: <del>fecal occult blood test,</del> digital rectal exam, <del>mammogram,</del> hearing screening, dipstick urinalysis, diabetes screening, thyroid function test, <del>influenza shot,</del> tetanus and diphtheria booster and education, administered or ordered by your doctor when not covered by Medicare</p> <p>- First \$120 each calendar year<br/>- Additional charges</p> | <p>\$0<br/>\$0</p> | <p>\$120<br/>\$0</p> | <p>\$0<br/>All Costs</p> |
|--|--------------------|----------------------|--------------------------|

\*\*\*Medicare benefits are subject to change. Please consult the latest *Guide to Health Insurance for People with Medicare*.

[Drafting Note: The term "certificate" should be substituted for the word "policy" throughout the outline of coverage where appropriate.]

D. Notice Regarding Policies or Certificates Which are Not Medicare Supplement Policies.

(1) Any accident and sickness insurance policy or certificate, other than a Medicare supplement policy, or a policy issued pursuant to a contract under Section 1876 of the Federal Social Security Act (42 U.S.C. § 1395 et seq.), disability income policy; basic, catastrophic, or major medical expense policy; single premium nonrenewable policy or other policy identified in Section 3B of this regulation, issued for delivery in this State to persons eligible for Medicare by reason of age shall notify insureds under the policy that the policy is not a Medicare supplement policy or certificate. The notice shall either be printed or attached to the first page of the outline of coverage delivered to insureds under the policy, or if no outline of coverage is delivered, to the first page of the policy or certificate delivered to insureds. The notice shall be in no less than twelve (12) point type and shall contain the following language:

"THIS [POLICY OR CERTIFICATE] IS NOT A MEDICARE SUPPLEMENT [POLICY OR CONTRACT]. If you are eligible for Medicare, review the "Guide to Health Insurance for People with Medicare" available from the company."

(2) Applications provided to persons eligible for Medicare for the health insurance policies or certificates described in Subsection D(1) shall disclose, using the applicable statement in Appendix C, the extent to which the policy duplicates Medicare. The disclosure statement shall be provided as a part of, or together with, the application for the policy or certificate.

Cross-reference to Section 16: See Appendix C, page \_\_\_\_.

Section 187. Requirements for Application Forms and Replacement Coverage

A. Application forms shall include the following questions designed to elicit information as to whether, as of the date of the application, the applicant has another Medicare supplement or other health insurance policy or certificate in force or whether a Medicare supplement policy or certificate is intended to replace any other accident and sickness or certificate is intended to replace any other accident and sickness policy or certificate presently in force. A supplementary application or other form to be signed by the applicant and agent containing such questions and statements may be used.

[Statements]

(1) You do not need more than one Medicare supplement policy.

(2) If you purchase this policy, you may want to evaluate your existing health coverage and decide if you need multiple coverages.

(3) You may be eligible for benefits under Medicaid and may not need a Medicare supplement policy.

(4) The benefits and premiums under your Medicare supplement policy can be suspended, if requested, during your entitlement to benefits under Medicaid for 24 months. You must request this suspension within 90 days of becoming eligible for Medicaid. If you are no longer entitled to Medicaid, your policy will be reinstated if requested within 90 days of losing Medicaid eligibility.

(5) Counseling services are available in your state to provide advice concerning your purchase of Medicare supplement insurance and concerning medical assistance through the state Medicaid program, including benefits as a Qualified Medicare Beneficiary (QMB) and a Specified Low-Income Medicare Beneficiary (SLMB).

[Questions]

To the best of your knowledge.

(1) Do you have another Medicare supplement

policy or certificate in force (including health care service contract, health maintenance organization contract)?

- (a) If so, with which company?
- (b) If so, do you intend to replace your current Medicare supplement policy with this policy [certificate]?

(2) Do you have any other health insurance coverage that provides benefits similar to this Medicare supplement policy?

- (a) If so, with which company?
- (b) What kind of policy?

(3) Are you covered for medical assistance through the State Medicaid program:

- (a) As a Specified Low-Income Medicare Beneficiary (SLMB)?
- (b) As a Qualified Medicare Beneficiary (QMB)?
- (c) For Other Medicaid medical benefits?

B. Agents shall list any other health policies they have sold to the applicant.

- (1) ~~His~~ [List] policies sold which are still in force.
- (2) List policies sold in the past five (5) years which are no longer in force.

C. In the case of a direct response issuer, a copy of the application or supplemental form, signed by the applicant, and acknowledged by the insurer, shall be returned to the applicant by the insurer upon delivery of the policy.

D. Upon determining that a sale will involve replacement of Medicare supplement coverage, any issuer, other than a direct response insurer, or its agent, shall furnish the applicant, prior to issuance or delivery of the Medicare supplement policy or certificate, a notice regarding replacement of accident and sickness coverage. One copy of such notice signed by the applicant and the agent, except where the coverage is sold without an agent, shall be provided to the applicant and an additional signed copy shall be retained by the insurer. A direct response issuer shall deliver to the applicant at the time of the issuance of the policy the notice regarding replacement of accident and sickness coverage.

E. The notice required by Subsection D above for an issuer shall be provided in substantially the following form in no less than twelve (12) point type.

NOTICE TO APPLICANT REGARDING REPLACEMENT OF MEDICARE SUPPLEMENT INSURANCE

[Insurance company's name and address]

SAVE THIS NOTICE! IT MAY BE IMPORTANT TO YOU IN THE FUTURE

According to [your application] [information you have furnished], you intend to terminate existing Medicare

supplement insurance and replace it with a policy to be issued by [Company Name] Insurance Company. Your new policy will provide thirty (30) days within which you may decide without cost whether you desire to keep the policy.

You should review this new coverage carefully. Compare it with all accident and sickness coverage you now have. If, after due consideration, you find that purchase of this Medicare supplement coverage is a wise decision, you should terminate your present Medicare supplement coverage. You should evaluate the need for other accident and sickness coverage you have that may duplicate this policy.

STATEMENT TO APPLICANT BY ISSUER, AGENT [BROKER OR OTHER REPRESENTATIVE]:

I have reviewed your current medical or health insurance coverage. To the best of my knowledge, this Medicare supplement policy will not duplicate your existing Medicare coverage because you intend to terminate your existing Medicare supplement coverage. The replacement policy is being purchased for the following reason(s) (check one):

- \_\_\_\_\_ Additional benefits.
- \_\_\_\_\_ No change in benefits, but lower premiums.
- \_\_\_\_\_ Fewer benefits and lower premiums.
- \_\_\_\_\_ Other.

1. Health conditions which you may presently have (preexisting conditions) may not be immediately or fully covered under the new policy. This could result in denial or delay of a claim for benefits under the new policy, whereas a similar claim might have been payable under your present policy.

2. State law provides that your replacement policy or certificate may not contain new preexisting conditions, waiting period, elimination periods or probationary periods.

3. If you still wish to terminate your present policy and replace it with new coverage, be certain to truthfully and completely answer all questions on the application concerning your medical and health history. Failure to include all material medical information on an application may provide a basis for the company to deny any future claims and to refund your premium as though your policy had never been in force. After the application has been completed and before you sign it, review it carefully to be certain that all information has been properly recorded. [If the policy or certificate is guaranteed issue, this paragraph need not appear.]

Do not cancel your present policy until you have received

you new policy and are sure that your want to keep it.

\_\_\_\_\_  
(Signature of Agent, Broker or Other Representative)

[Typed Name and Address of Issuer, Agent or Broker]

\_\_\_\_\_  
(Applicant's Signature)

\_\_\_\_\_  
(Date)

\*Signature not required for direct response sales.

F. Paragraphs 1 and 2 of the replacement notice (applicable to preexisting conditions) may be deleted by an issuer if the replacement does not involve application of a new preexisting condition limitation.

#### Section 198.Filing Requirements for Advertising

An issuer shall provide a copy of any Medicare supplement advertisement intended for use in this State whether through written, radio or television medium to the Commissioner of Insurance of this State for review or approval by the Commissioner to the extent it may be required under state law.

#### Section 2049.Standards for Marketing

A. An issuer directly or through its producers, shall:

(1) Establish marketing procedures to assure that any comparison of policies by its agents or other producers will be fair and accurate.

(2) Establish marketing procedures to assure excessive insurance is not sold or issued.

(3) Display prominently by type or other appropriate means, on the first page of the policy the following:

"Notice to buyer: This policy may not cover all of your medical expenses."

(4) Inquire and otherwise make every reasonable effort to identify whether a prospective applicant or enrollee for Medicare supplement insurance already has accident and sickness insurance and the types and amounts of any such insurance.

(5) Establish auditable procedures for verifying compliance with this Subsection A.

B. In addition to the practices prohibited in [insert citation to state unfair trade practices act], the following acts and practices are prohibited:

(1) Twisting. Knowingly making any misleading representation or incomplete or fraudulent comparison of

any insurance policies or insurers for the purpose of including, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance with another insurer.

(2) High pressure tactics. Employing any method of marketing having the effect of or tending to induce the purchase of insurance through force, fright, threat, whether explicit or implied, or undue pressure to purchase or recommend the purchase of insurance.

(3) Cold lead advertising. Making use directly or indirectly of any method of marketing which fails to disclose in a conspicuous manner that a purpose of the method of marketing is solicitation of insurance and that contact will be made by an insurance agent or insurance company.

C. The terms "Medicare Supplement," "Medigap," "Medicare Wraparound" and words of similar import shall not be used unless the policy is issued in compliance with this regulation.

#### Section 210.Appropriateness of Recommended Purchase and Excessive Insurance

A. In recommending the purchase or replacement of any Medicare supplement policy or certificate an agent shall make reasonable efforts to determine the appropriateness of a recommended purchase or replacement.

B. Any sale of Medicare supplement coverage that will provide an individual more than one Medicare supplement policy or certificate is prohibited.

#### Section 224.Reporting of Multiple Policies

A. On or before March 1 of each year, an issuer shall report the following information for every individual resident of this State for which the issuer has in force more than one Medicare supplement policy or certificate:

1. Policy and certificate number; and
2. Date of issuance.

B. The items set forth above must be grouped by individual policyholder.

#### Section 232.Prohibition Against Preexisting Conditions, Waiting Periods, Elimination Periods and Probationary Periods in Replacement Policies or Certificates

A. If a Medicare supplement policy or certificate replaces another Medicare supplement policy or certificate, the replacing issuer shall waive any time periods applicable to preexisting conditions, waiting periods, elimination periods and probationary periods in the new Medicare supplement policy or certificate to the extent such time was spent under the original policy.

B. If a Medicare supplement policy or certificate replaces another Medicare supplement policy or certificate which has been in effect for at least six (6) months, the replacing policy shall not provide any time period applicable

to preexisting conditions, waiting periods, elimination periods and probationary periods.

Section 243. Separability

If any provision of this regulation or the application thereof to any person or circumstances is for any reason held to be invalid, the remainder of the regulation and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 254. Effective Date

This Regulation shall be effective on January 1, 1992.  
David N. Levinson

November 8, 1991

APPENDIX A

MEDICARE SUPPLEMENT REFUND CALCULATION FORM FOR CALENDAR YEAR \_\_\_\_\_

TYPE<sup>1</sup> \_\_\_\_\_  
SMSBP<sup>2</sup> \_\_\_\_\_  
FOR THE STATE OF \_\_\_\_\_ COMPANY NAME \_\_\_\_\_  
NAIC Group Code \_\_\_\_\_ NAIC Company Code \_\_\_\_\_  
PERSON COMPLETING THIS EXHIBIT

Title \_\_\_\_\_ Telephone Number \_\_\_\_\_

(a) (b)  
Earned Incurred  
Premium<sup>3</sup> Claims<sup>4</sup>

Line

- 1. Current Year's Experience
  - a. Total (all policy years)
  - b. Current year's issues (%)
  - c. Net (for reporting purposes = 1a - 1b) \_\_\_\_\_

2. Past Years' Experience (All Policy Years) \_\_\_\_\_

3. Total Experience (Net Current Year + Past Years' Experience) \_\_\_\_\_

4. Refunds Last Year (Excluding Interest) \_\_\_\_\_

5. Previous Since Inception (Excluding Interest) \_\_\_\_\_

6. Refunds Since Inception (Excluding Interest) \_\_\_\_\_

7. Benchmark Ratio Since Inception (SEE WORKSHEET FOR RATIO 1) \_\_\_\_\_

8. Experienced Ratio Since Inception \_\_\_\_\_

Total Actual Incurred Claims (Line 3, Col. b) = Ratio 2 \_\_\_\_\_

Tot. Earned Prem. (Line 3, Col. a — Refunds Since Inception (line 6)

9. Life Years Exposed Since Inception \_\_\_\_\_

If the Experienced Ratio is less than the Benchmark Ratio, and there are more than 500 life years exposure, then proceed to calculation of refund.

APPENDIX A

MEDICARE SUPPLEMENT REFUND CALCULATION FORM FOR CALENDAR YEAR \_\_\_\_\_

TYPE<sup>1</sup> \_\_\_\_\_  
SMSBP<sup>2</sup> \_\_\_\_\_  
FOR THE STATE OF \_\_\_\_\_ COMPANY NAME \_\_\_\_\_  
NAIC Group Code \_\_\_\_\_ NAIC Company Code \_\_\_\_\_  
PERSON COMPLETING THIS EXHIBIT

Title \_\_\_\_\_ Telephone Number \_\_\_\_\_

10. Tolerance Permitted (obtained from credibility table) \_\_\_\_\_

11. Adjustment to Incurred Claim for Credibility Ratio 3 = Ratio 2 + Tolerance

If Ratio 3 is more than benchmark ratio (ratio 1), a refund or credit to premium is not required.

12. Adjusted Incurred Claims =

(Tot. Earned Premiums (line 3, col. a) — Refunds Since Inception (line 6) x Ratio 3 (line 11)

13. Refund = Total Earned Premium (line 3, col. a) —  
 Refunds Since Inception (line 6) —  
 Adjusted Incurred Claims (line 12)  
 Benchmark Ratio (Ratio 1)

If the amount on line 13 is less than .005 times the annualized premium in force as of December 31 of the reporting year, then no refund is made. Otherwise, the amount on line 13 is to be refunded or credited, and a description of the refund and/or credit against premiums to be used must be attached to this form.

**MEDICARE SUPPLEMENT CREDIBILITY TABLE**

Life Years Exposed Since Inception Tolerance

- 10,000+0.0%
- 5,000 - 9,999 5.0%
- 2,500 - 4,999 7.5%
- 1,000 - 2,499 10.0%
- 500 - 999 15.0%

If less than 500, no credibility.

<sup>1</sup>Individual, group, individual Medicare Select, or group Medicare "Select only

<sup>2</sup>"SMSBP" = Standardized Medicare Supplement Benefit Plan

<sup>3</sup>Includes model Loadings and fees charged.

<sup>4</sup>Excludes Active Life Reserves.

<sup>5</sup>This is to be used as "Issue Year Earned Premium" for Year 1 of next year's "Worksheet for Calculation of Benchmark Ratios".

I certify that the above information and calculations are true and accurate to the best of my knowledge and belief.

Signature \_\_\_\_\_

Name — Please Type \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

**APPENDIX A  
 REPORTING FORM FOR THE CALCULATION OF  
 BENCHMARK RATIO SINCE INCEPTION  
 FOR INDIVIDUAL POLICIES FOR CALENDAR YEAR**

TYPE<sup>1</sup> \_\_\_\_\_  
 SMSBP<sup>2</sup> \_\_\_\_\_  
 FOR THE STATE OF \_\_\_\_\_ COMPANY  
 NAME \_\_\_\_\_  
 NAIC Group Code \_\_\_\_\_ NAIC Company  
 Code \_\_\_\_\_  
 PERSON COMPLETING THIS EXHIBIT

Title \_\_\_\_\_ Telephone  
 Number \_\_\_\_\_

| (a) <sup>3</sup> | (b) <sup>4</sup> | (c)    | (d)       | (e)                   | (f)       | (g)    | (h)       | (i)                   | (j)       | (o) <sup>5</sup>       |
|------------------|------------------|--------|-----------|-----------------------|-----------|--------|-----------|-----------------------|-----------|------------------------|
| Year             | Earned Premium   | Factor | (b) x (c) | Cumulative Loss Ratio | (d) x (e) | Factor | (b) x (g) | Cumulative Loss Ratio | (h) x (i) | Policy Year Loss Ratio |
| 1                |                  | 2.770  |           | 0.442                 |           | 0.000  |           | 0.000                 |           | 0.4                    |
| 2                |                  | 4.175  |           | 0.493                 |           | 0.000  |           | 0.000                 |           | 0.55                   |
| 3                |                  | 4.175  |           | 0.493                 |           | 1.194  |           | 0.659                 |           | 0.65                   |
| 4                |                  | 4.175  |           | 0.493                 |           | 2.245  |           | 0.669                 |           | 0.67                   |
| 5                |                  | 4.175  |           | 0.493                 |           | 3.170  |           | 0.678                 |           | 0.69                   |

**FINAL REGULATIONS**

|       |  |       |      |       |      |       |      |       |      |      |
|-------|--|-------|------|-------|------|-------|------|-------|------|------|
| 6     |  | 4.175 |      | 0.493 |      | 3.998 |      | 0.686 |      | 0.71 |
| 7     |  | 4.175 |      | 0.493 |      | 4.754 |      | 0.695 |      | 0.73 |
| 8     |  | 4.175 |      | 0.493 |      | 5.445 |      | 0.702 |      | 0.75 |
| 9     |  | 4.175 |      | 0.493 |      | 6.075 |      | 0.708 |      | 0.76 |
| 10    |  | 4.175 |      | 0.493 |      | 6.650 |      | 0.713 |      | 0.76 |
| 11    |  | 4.175 |      | 0.493 |      | 7.176 |      | 0.717 |      | 0.76 |
| 12    |  | 4.175 |      | 0.493 |      | 7.655 |      | 0.720 |      | 0.77 |
| 13    |  | 4.175 |      | 0.493 |      | 8.093 |      | 0.723 |      | 0.77 |
| 14    |  | 4.175 |      | 0.493 |      | 8.493 |      | 0.725 |      | 0.77 |
| 15    |  | 4.175 |      | 0.493 |      | 8.684 |      | 0.725 |      | 0.77 |
| Total |  |       | (k): |       | (l): |       | (m): |       | (n): |      |

Benchmark Ratio Since Inception:  $(l \div n) / (k \div m)$

**APPENDIX A  
REPORTING FORM FOR THE CALCULATION OF  
BENCHMARK RATIO SINCE INCEPTION  
FOR INDIVIDUAL POLICIES FOR CALENDAR YEAR**

<sup>1</sup>Individual, group, individual Medicare Select, or group Medicare "Select only

<sup>2</sup>"SMSBP" = Standardized Medicare Supplement Benefit Plan - Use "P" for pre-standardized plans

<sup>3</sup>Year 1 is the current calendar year - 1. Year 2 is the current calendar year - 2 (etc.) (Example: If the current year is 1991, then: Year 1 is 1990; Year 2 is 1989, etc.)

<sup>4</sup>For the calendar year on the appropriate line in column (a), the premium earned during that year for policies issued in that year.

<sup>5</sup>These loss ratios are not explicitly used in computing the benchmark loss ratios. They are the loss ratios, on a policy year basis, which result in the cumulative loss ratios displayed on this worksheet. They are shown here for informational purposes only.

TYPE<sup>1</sup> \_\_\_\_\_  
 SMSBP<sup>2</sup> \_\_\_\_\_  
 FOR THE STATE OF \_\_\_\_\_ COMPANY  
 NAME \_\_\_\_\_  
 NAIC Group Code \_\_\_\_\_ NAIC Company  
 Code \_\_\_\_\_  
 PERSON \_\_\_\_\_ COMPLETING THIS EXHIBIT

\_\_\_\_\_  
 Title \_\_\_\_\_ Telephone  
 Number \_\_\_\_\_

| (a) <sup>3</sup> | (b) <sup>4</sup> | (c)    | (d)       | (e)                   | (f)       | (g)    | (h)       | (i)                   | (j)       | (o) <sup>5</sup>       |
|------------------|------------------|--------|-----------|-----------------------|-----------|--------|-----------|-----------------------|-----------|------------------------|
| Year             | Earned Premium   | Factor | (b) x (c) | Cumulative Loss Ratio | (d) x (e) | Factor | (b) x (g) | Cumulative Loss Ratio | (h) x (i) | Policy Year Loss Ratio |
| 1                |                  | 2.770  |           | 0.507                 |           | 0.000  |           | 0.000                 |           | 0.46                   |
| 2                |                  | 4.175  |           | 0.567                 |           | 0.000  |           | 0.000                 |           | 0.63                   |
| 3                |                  | 4.175  |           | 0.567                 |           | 1.194  |           | 0.759                 |           | 0.75                   |
| 4                |                  | 4.175  |           | 0.567                 |           | 2.245  |           | 0.771                 |           | 0.77                   |

# FINAL REGULATIONS

2105

|       |       |       |       |       |      |
|-------|-------|-------|-------|-------|------|
| 5     | 4.175 | 0.567 | 3.170 | 0.782 | 0.8  |
| 6     | 4.175 | 0.567 | 3.998 | 0.792 | 0.82 |
| 7     | 4.175 | 0.567 | 4.754 | 0.802 | 0.84 |
| 8     | 4.175 | 0.567 | 5.445 | 0.811 | 0.87 |
| 9     | 4.175 | 0.567 | 6.075 | 0.818 | 0.88 |
| 10    | 4.175 | 0.567 | 6.650 | 0.824 | 0.88 |
| 11    | 4.175 | 0.567 | 7.176 | 0.828 | 0.88 |
| 12    | 4.175 | 0.567 | 7.655 | 0.831 | 0.88 |
| 13    | 4.175 | 0.567 | 8.093 | 0.834 | 0.89 |
| 14    | 4.175 | 0.567 | 8.493 | 0.837 | 0.89 |
| 15    | 4.175 | 0.567 | 8.684 | 0.838 | 0.89 |
| Total |       | (k):  | (l):  | (m):  | (n): |

Benchmark Ratio Since Inception:  $(l \div n) / (k \div m)$ :

Phone Number:

<sup>1</sup>Individual, group, individual Medicare Select, or group Medicare "Select only

<sup>2</sup>"SMSBP" = Standardized Medicare Supplement Benefit Plan - Use "P" for pre-standardized plans

<sup>3</sup>Year 1 is the current calendar year - 1. Year 2 is the current calendar year - 2 (etc.) (Example: If the current year is 1991, then: Year 1 is 1990; Year 2 is 1989, etc.)

<sup>4</sup>For the calendar year on the appropriate line in column (a), the premium earned during that year for policies issued in that year.

<sup>5</sup>These loss ratios are not explicitly used in computing the benchmark loss ratios. They are the loss ratios, on a policy year basis, which result in the cumulative loss ratios displayed on this worksheet. They are shown here for informational purposes only.

APPENDIX B

FORM FOR REPORTING  
DUPLICATE MEDICARE SUPPLEMENT POLICIES

Company Name:

Address:

Due March 1, annually

The purpose of this form is to report the following information on each resident of this state who has in force more than one Medicare supplement policy or certificate. The information is to be grouped by individual policyholder.

Policy and Date of  
Certificate #Issuance

Signature

Name and Title (please type)

Date

APPENDIX C

DISCLOSURE STATEMENTS

Instructions for Use of the Disclosure Statements for Health Insurance Policies sold to Medicare Beneficiaries that Duplicate Medicare

1. Section 1882(d) of the Federal Social Security Act, P.L. 103-432, [42 U.S.C. 1395ss] prohibits the sale of a health insurance policy (the term policy or policies

includes certificates) that duplicate Medicare benefits unless it will pay benefits without regard to other health coverage and it includes the prescribed disclosure statement on or together with the application.

2. All types of health insurance policies that duplicate Medicare shall include one of the attached disclosure statements, according to the particular policy type involved, on the application or together with the application. The disclosure statement may not vary from the attached statements in terms of language or format (type size, type proportional spacing, bold character, line spacing, and usage of boxes around text).

3. State and federal law prohibits insurers from selling a Medicare supplement policy to a person that already has a Medicare supplement policy except as a replacement.

4. Property/casualty and life insurance policies are not considered health insurance.

5. Disability income policies are not considered to provide benefits that duplicate Medicare.

6. Long-term care insurance policies that coordinate with Medicare and other health insurance are not considered to provide benefits that duplicate Medicare.

7. The federal law does not pre-empt state laws that are more stringent than the federal requirements.

8. The federal law does not pre-empt existing state form filing requirements.

9. Section 1882 of the federal Social Security Act was amended in Subsection (d)(3)(A) to allow for alternative disclosure statements. The disclosure statements already in Appendix C remain. Carriers may use either disclosure statement with the requisite insurance product. However, carriers should use either the original disclosure statements or the alternative disclosure statements and not use both simultaneously.

[Original disclosure statement for policies that provide benefits for expenses incurred for an accidental injury only]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

This insurance provides limited benefits, if you meet the policy conditions, for hospital or medical expenses that result from accidental injury. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

This insurance duplicates Medicare benefits when it pays:

- hospital or medical expenses up to the maximum stated in the policy
- Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- other approved items and services

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Original disclosure statement for policies that provide benefits for specified limited services]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

This insurance provides limited benefits, if you meet the policy conditions, for expenses relating to the specific services listed in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

This insurance duplicates Medicare benefits when:

- any of the services covered by the policy are also covered by Medicare

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- other approved items and services

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health*

*Insurance for People with Medicare*, available from the insurance company.

✓For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Original disclosure statement Ffor policies that reimburse expenses incurred for specified disease(s) or other specified impairment(s). This includes expense incurred cancer, specified disease and other types of health insurance policies that limit reimbursement to named medical conditions.]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

This insurance provides limited benefits, if you meet the policy conditions, for hospital or medical expenses only when you are treated for one of the specific diseases or health conditions listed in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

This insurance duplicates Medicare benefits when it pays:

- hospital or medical expenses up to the maximum stated in the policy

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- other approved items and services

Before You Buy This Insurance

✓Check the coverage in all health insurance policies you already have.

✓For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Original disclosure statement Ffor policies that pay fixed

dollar amounts for specified diseases or other specified impairments. This includes cancer, specified disease, and other health insurance policies that pay a scheduled benefit or specific payment based on diagnosis of the conditions named in the policy.]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

This insurance pays a fixed amount, regardless of your expenses, if you meet the policy conditions, for one of the specific diseases or health conditions named in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

This insurance duplicates Medicare benefits because Medicare generally pays for most of the expenses for the diagnosis and treatment of the specific conditions or diagnoses named in the policy.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

Before You Buy This Insurance

✓Check the coverage in all health insurance policies you already have.

✓For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Original disclosure statement Ffor indemnity policies and other policies that pay a fixed dollar amount per day, excluding long-term care policies.]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

This insurance pays a fixed amount, regardless of your

expenses, for each day you meet the policy conditions. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

This insurance duplicates Medicare benefits when:

- any expenses or services covered by the policy are also covered by Medicare

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Original disclosure statement For policies that provide benefits for both expenses incurred and fixed indemnity basis]

IMPORTANT NOTICE TO PERSONS ON MEDICARE  
THIS INSURANCE DUPLICATES SOME MEDICARE  
BENEFITS

This is not Medicare Supplement Insurance

This insurance pays limited reimbursement for expenses if you meet the conditions listed in the policy. It also pays a fixed amount, regardless of your expenses, if you meet other policy conditions. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

This insurance duplicates Medicare benefits when:

- any expenses or services covered by the policy are also covered by Medicare; or
- it pays the fixed dollar amount stated in the policy and

Medicare covers the same event

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[For long-term care policies providing both nursing home and noninstitutional coverage]

IMPORTANT NOTICE TO PERSONS ON MEDICARE  
THIS INSURANCE DUPLICATES SOME MEDICARE  
BENEFITS

This is not Medicare Supplement Insurance

Federal law requires us to inform you that this insurance duplicates Medicare benefits in some situations.

- This is a long-term care insurance that provides benefits for covered nursing home and home care services.
- In some situations Medicare pays for short periods of skilled nursing home care, limited home health services and hospice care.
- This insurance does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Neither Medicare nor Medicare Supplement insurance provides benefits for most long-term care expenses.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about long-term care insurance,

review the Shopper's Guide to Long-Term Care Insurance, available from the insurance company.

✓ For more information about Medicare and Medicare Supplement insurance, review the Guide to Health Insurance for People with Medicare, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[For policies providing nursing home benefits only]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

Federal law requires us to inform you that this insurance duplicates Medicare benefits in some situations.

- This insurance provides benefits primarily for covered nursing home services.
- In some situations Medicare pays for short periods of skilled nursing home care and hospice care.
- This insurance does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Neither Medicare nor Medicare Supplement insurance provides benefits for most nursing home expenses.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about long-term care insurance, review the Shopper's Guide to Long-Term Care Insurance, available from the insurance company.

✓ For more information about Medicare and Medicare Supplement insurance, review the Guide to Health Insurance for People with Medicare, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[For policies providing home care benefits only]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

Federal law requires us to inform you that this insurance duplicates Medicare benefits in some situations.

- This insurance provides benefits primarily for covered home care services.
- In some situations Medicare will cover some health related services in your home and hospice care which may also be covered by this insurance.
- This insurance does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Neither Medicare nor Medicare Supplement insurance provides benefits for most services in your home.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about long-term care insurance, review the Shopper's Guide to Long-Term Care Insurance, available from the insurance company.

✓ For more information about Medicare and Medicare Supplement insurance, review the Guide to Health Insurance for People with Medicare, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Original disclosure statement For other health insurance policies not specifically identified in the previous statements]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS INSURANCE DUPLICATES SOME MEDICARE BENEFITS

This is not Medicare Supplement Insurance

This insurance provides limited benefits if you meet the conditions listed in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

This insurance duplicates Medicare benefits when it pays:

- the benefits stated in the policy and coverage for the same event is provided by Medicare

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These

include:

- hospitalization
- physician services
- hospice
- other approved items and services

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Alternative disclosure statement for policies that provide benefits for expenses incurred for an accidental injury only.]

**IMPORTANT NOTICE TO PERSONS ON MEDICARE  
THIS IS NOT MEDICARE SUPPLEMENT INSURANCE**  
Some health care services paid for by Medicare may also trigger the payment of benefits from this policy.

This insurance provides limited benefits, if you meet the policy conditions, for hospital or medical expenses that result from accidental injury. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- other approved items and services

This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Alternative disclosure statement for policies that provide benefits for specified limited services.]

**IMPORTANT NOTICE TO PERSONS ON MEDICARE  
THIS IS NOT MEDICARE SUPPLEMENT INSURANCE**

Some health care services paid for by Medicare may also trigger the payment of benefits from this policy.

This insurance provides limited benefits, if you meet the policy conditions, for expenses relating to the specific services listed in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- other approved items and services

This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Alternative disclosure statement for policies that reimburse expenses incurred for specified diseases or other specified impairments. This includes expense-incurred cancer, specified disease and other types of health insurance policies]

that limit reimbursement to named medical conditions.]

**IMPORTANT NOTICE TO PERSONS ON MEDICARE  
THIS IS NOT MEDICARE SUPPLEMENT INSURANCE**

Some health care services paid for by Medicare may also trigger the payment of benefits from this policy. Medicare generally pays for most or all of these expenses.

This insurance provides limited benefits, if you meet the policy conditions, for hospital or medical expenses only when you are treated for one of the specific diseases or health conditions listed in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.

**Before You Buy This Insurance**

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Alternative disclosure statement for policies that pay fixed dollar amounts for specified diseases or other specified impairments. This includes cancer, specified disease, and other health insurance policies that pay a scheduled benefit or specific payment based on diagnosis of the conditions named in the policy.]

**IMPORTANT NOTICE TO PERSONS ON MEDICARE  
THIS IS NOT MEDICARE SUPPLEMENT INSURANCE**

Some health care services paid for by Medicare may also trigger the payment of benefits from this policy.

This insurance pays a fixed amount, regardless of your expenses, if you meet the policy conditions, for one of the specific diseases or health conditions named in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.

**Before You Buy This Insurance**

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Alternative disclosure statement for indemnity policies and other policies that pay a fixed dollar amount per day, excluding long-term care policies.]

**IMPORTANT NOTICE TO PERSONS ON MEDICARE  
THIS IS NOT MEDICARE SUPPLEMENT INSURANCE**

Some health care services paid for by Medicare may also trigger the payment of benefits from this policy.

This insurance pays a fixed dollar amount, regardless of your expenses, for each day you meet the policy conditions. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary

services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Alternative disclosure statement for policies that provide benefits upon both an expense-incurred and fixed indemnity basis.]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS IS NOT MEDICARE SUPPLEMENT INSURANCE

Some health care services paid for by Medicare may also trigger the payment of benefits from this policy.

This insurance pays limited reimbursement for expenses if you meet the conditions listed in the policy. It also pays a fixed amount, regardless of your expenses, if you meet other policy conditions. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

[Alternative disclosure statement for other health insurance policies not specifically identified in the preceding statements.]

#### IMPORTANT NOTICE TO PERSONS ON MEDICARE THIS IS NOT MEDICARE SUPPLEMENT INSURANCE

Some health care services paid for by Medicare may also trigger the payment of benefits from this policy.

This insurance provides limited benefits if you meet the conditions listed in the policy. It does not pay your Medicare deductibles or coinsurance and is not a substitute for Medicare Supplement insurance.

Medicare generally pays for most or all of these expenses.

Medicare pays extensive benefits for medically necessary services regardless of the reason you need them. These include:

- hospitalization
- physician services
- hospice
- other approved items and services

This policy must pay benefits without regard to other health benefit coverage to which you may be entitled under Medicare or other insurance.

Before You Buy This Insurance

✓ Check the coverage in all health insurance policies you already have.

✓ For more information about Medicare and Medicare

Supplement insurance, review the *Guide to Health Insurance for People with Medicare*, available from the insurance company.

✓ For help in understanding your health insurance, contact your state insurance department or state senior insurance counseling program.

## DEPARTMENT OF INSURANCE

Statutory Authority: 18 Delaware Code,  
Section 314 (18 Del.C. 314)

### LONG-TERM CARE INSURANCE REGULATION REGULATION 63

Adopted: July 30, 1990  
Amended: December 23, 1996  
Amended: [March 22, 1999]

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#### Section 1.Purpose

The purpose of this regulation is to implement 18 Del. C., Chapter 71, to promote the public interest, to promote the availability of long-term care insurance coverage, to protect applicants for long-term care insurance, from unfair or deceptive sales or enrollment practices, to facilitate public understanding and comparison of long-term care insurance coverages, and to facilitate flexibility and innovation in the development of long-term care insurance.

#### Section 2.Authority

This regulation is issued pursuant to the authority vested in the Commissioner under 18 Del. C. Sec. 314.

#### Section 3.Applicability and [Scope]~~[scope]~~

Except as otherwise specifically provided, this regulation applies to all long-term care insurance policies and certificates delivered or issued for delivery in this state on or after the effective date hereof, by insurers; fraternal benefit societies; nonprofit health, hospital and medical service corporations; prepaid health plans; health maintenance organizations and all similar organizations.

#### Section 4.Definitions

For the purpose of this regulation, the terms "Department," "long-term care insurance," "Commissioner," "applicant," "policy" and "certificate" shall have the meanings set forth in 18 Del. C. Sections 102 and 7103.

#### Section 5.Policy ~~[Definitions]~~~~[definitions]~~

No long-term care insurance policy delivered or issued for delivery in this state shall use the terms set forth below, or terms of like or similar meaning, unless the terms are defined in the policy and the definitions satisfy the following requirements:

[A(1)]“Activities of daily living” means at least bathing,

contenance, dressing, eating, toileting and transferring.

~~A[B.(2)]~~"Acute Condition" means that the individual is medically unstable. Such an individual requires frequent monitoring by medical professionals, such as physicians and registered nurses, in order to maintain their health status.

~~B[C.(3)]~~"Adult day care" means a program for six (6) or more individuals, of social and health-related services provided during the day in a community group setting for the purpose of supporting frail, impaired elderly or other disabled adults who can benefit from care in a group setting outside the home.

~~D(4)]~~"Chronically ill" means any individual who has been certified by a Licensed Health Care Practitioner as being unable to perform, without substantial assistance from another individual, at least two activities of daily living for a period of at least ninety (90) days; or who requires substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.

~~(5)E.]~~ "Cognitive impairment" means a deficiency in a person's short-term or long-term memory, orientation as to person, place, and time, deductive [or abstract] reasoning, or judgment [as it relates to safety awareness.]

~~E[F.(6)]~~"Home health care services" means medical and nonmedical services provided to ill, disabled or infirm persons in their residences. Such services may include homemaker services, assistance with activities of daily living and respite care services.

~~D[G.(7)]~~ "Medicare" ~~[means shall be defined as]~~ "The Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965 as Then Constituted or Later Amended," or "Title I, Part I of Public Law 89-97, as Enacted by the Eighty-Ninth Congress of the United States of America and popularly known as the Health Insurance for the Aged Act, as then constituted and any later amendments or substitutes thereof," or words of similar import.

~~E[H.(8)]~~"Mental or nervous disorder" shall not be defined to include more than neurosis, psychoneurosis, psychopathy, psychosis, or mental or emotional disease or disorder.

~~F[H.(9)]~~"Personal care" means the provision of hands-on services to assist an individual with activities of daily living (such as bathing, eating, dressing, transferring and toileting).

~~G[H.(10)]~~ "Preexisting Conditions" shall be defined in accordance with 18 Del. C. Sec. 7105 (C).

~~H[K.(11)]~~ "Qualified Long-Term Care Insurance Policy" means a policy that provides coverage for qualified long-term care services that is intended to meet the requirements of § 7702B(b) of the Internal Revenue Code of 1986, as amended.

~~H[L.(12)]~~ "Qualified Long-Term Care Services" means necessary diagnostic, preventive therapeutic, curing, treating, mitigating and rehabilitative services and Maintenance or Personal Care Services which are required by a Chronically Ill Individual and are provided pursuant to a Plan of Care prescribed by a Licensed Health Care Practitioner.

~~H[M.(13)]~~ "Skilled nursing care," "intermediate care," "personal care," "home care," and other services shall be defined in relation to the level of skill required, nature of the care and the setting in which care must be delivered.

~~H[N.(14)]~~ All providers of services, including but not limited to "skilled nursing facility," "extended care facility," "intermediate care facility," "convalescent nursing home," "personal care facility," and "home care agency" shall be defined in relation to the services and facilities required to be available and the licensure or degree status of those providing or supervising the services. The definition may require that the provider be appropriately licensed or certified.

#### Section 6. Policy Practices and Provisions

A. Renewability. The terms "guaranteed renewable" and "noncancellable" shall not be used in any individual long-term care insurance policy without providing further explanatory language in accordance with the disclosure requirements of Section 7 of this regulation.

(1) No such policy issued to an individual shall contain renewal provisions less favorable to the insured than "guaranteed renewable." However, the Commissioner may authorize nonrenewal on a statewide basis, on terms and conditions deemed necessary by the Commissioner, to best protect the interests of the insureds, if the insurer demonstrates: That renewal will jeopardize the insurer's solvency.

(2) The term "guaranteed renewable" may be used only when the insured has the right to continue the long-term care insurance in force by the timely payment of premiums, during which period the insurer has no unilateral right to

make any change in any provision of the policy or rider, and cannot decline to renew and cannot revise rates except on a class basis in accordance with subsection 4 below. This cost disclosure must be approved by the Commissioner and included in any solicitation and also prominently displayed on the initial policy.

(3) Every long-term care insurance policy or certificate issued or delivered in this State must be "guaranteed renewable" as defined in subsection 2 above, and contain a cost disclosure section as defined subsection 4 below.

(4) (a) The following cost disclosure information shall appear in bold print on the cover page of every individual policy and Outline of Coverage issued or delivered in this state: "This policy provides only the following price protection, and no more. Your premiums may not increase by more than X% during any given calendar year and your benefits may not decrease. Any representations that these increases will not take place are unauthorized and shall not be relied upon."

(b) The following cost disclosure information shall appear in bold print on the cover page of every certificate and Outline of Coverage issued or delivered in this state: "This policy provides only the following price protection, and no more. Your premiums are guaranteed to remain the same for the first three (3) years this policy is in force. Your premiums may not increase by more than X% during any three year rating period. Insurers will be allowed a carry forward of the initially disclosed maximum premium increase, but said carry forward is lost within twenty-four (24) months if not utilized." Any additional language that appears under the cost disclosure section must be approved in advance by the Delaware Insurance Department. The purpose of this cost disclosure section is twofold: first, to make crystal clear to the purchaser what the maximum cost will be from year to year, and second, to prohibit the practice of low pricing during the early years of a policy followed by dramatic increases designed to produce a high ratio of cancellations when the group insured reaches that age at which its members are more likely to file claims. Therefore, this section does not permit annual increases to be accumulated and applied all at once. For example, if the price is \$100 in the initial year of the policy and 10% is the represented annual maximum increase, then during the second year of the policy, the maximum allowable price is \$110, the third year of the policy the maximum allowable price is not more than 110% of the price actually charges during year two of the policy. It is not permissible to charge \$121 during the third year of the policy unless \$110 had actually been charged during year two of the policy. In other

words, any permitted annual price increase not implemented during a calendar year is thereafter waived and may not be considered in calculating future prices.

**[(5) In addition to other requirements of this subsection, a qualified long-term care insurance contract shall be guaranteed renewable.]**

B. Limitations and Exclusions. No policy may be delivered or issued for delivery in this state as long-term care insurance if such policy limits or excludes coverage by type of illness, treatment, medical condition or accident, except as follows:

- (1) Preexisting conditions;
- (2) Mental or nervous disorders; however, this shall not permit exclusion or limitation of benefits on the basis of Alzheimer's Disease;
- (3) Alcoholism and drug addiction;
- (4) Illness, treatment or medical condition arising out of:
  - (a) War or act of war (whether declared or undeclared);
  - (b) Participation in a felony, riot or insurrection;
  - (c) Service in the armed forces or units auxiliary thereto;
  - (d) Suicide (sane or insane), attempted suicide or intentionally self-inflicted injury; or
  - (e) Aviation (this exclusion applies only to non-fare-paying passengers).
- (5) Treatment provided in a government facility (unless otherwise required by law), services for which benefits are available under Medicare or other governmental program (except Medicaid), any state or federal workers' compensation, employer's liability or occupational disease law, or any motor vehicle no-fault law, services provided by a member of the covered person's immediate family and services for which no charge is normally made in the absence of insurance.

(6) No territorial limitations ~~[will be permitted are permissible,]~~ except that nothing herein shall preclude limiting benefits for specific services to a specific dollar amount, or to that dollar amount which is reasonable and prevailing in a particular geographic area which is defined and clearly delineated in the original offering or solicitation and the initial policy or certificate, or to specific providers within a particular geographic area. Moreover, nothing herein shall prohibit the limitation of services to a particular geographic area when the insured elects to receive services within that specific geographical area. For purposes of this clause, the location of receipt of services must be within 50 miles of the domicile of the insured at the time of entry

therein or that area, including the nearest three nursing homes, whichever distance is greater.

**[7. Expenses for services or items available or paid under another long-term care insurance or health insurance policy.**

**8. In the case of a qualified long-term care insurance contract expenses for services or items to the extent that the expenses are reimbursable under Title XVIII of the Social Security Act or would be so reimbursable but for the application of a deductible or coinsurance amount.**

**9. This Subsection B is not intended to prohibit exclusions and limitations by type of provider.]**

C. Extension of Benefits. Termination of long-term care insurance shall be without prejudice to any benefits payable for institutionalization which began while the long-term care insurance was in force and continues without interruption after termination. Such extension of benefits beyond the period the long-term care insurance was in force may be limited to the duration of the benefit period, if any, or to payment of the maximum benefits and may be subject to any policy waiting period, and all other applicable provisions of the policy.

D. Continuation or Conversion.

(1) Group long-term care insurance issued in this state on or after the effective date of this section shall provide covered individuals with a basis for continuation or conversion of coverage.

(2) For the purposes of this section, "a basis for continuation of coverage" means a policy provision which maintains coverage under the existing group policy when such coverage would otherwise terminate and which is subject only to the continued timely payment of premium when due. Group policies which restrict provision of benefits and services to, or contain incentives to use certain providers and/or facilities may provide continuation benefits which are substantially equivalent to the benefits under the existing policy. The Commissioner shall make a determination as to the substantial equivalency of benefits, and in doing so, shall take into consideration the differences between managed care and non-managed care plans, including, but not limited to, provider system arrangements, service availability, benefit levels and administrative complexity.

(3) For the purposes of this section, "a basis for conversion of coverage" means a policy provision that an individual whose coverage under the group policy would otherwise terminate or has been terminated for any reason, including discontinuance of the group policy in its entirety or with respect to an insured class, and who has been

continuously insured under the group policy (and any group policy which it replaced), for at least six months immediately prior to termination, shall be entitled to the issuance of a converted policy by the insurer under whose group policy he or she is covered, without evidence of insurability.

(4) For the purposes of this section, "converted policy" means an individual policy of long-term care insurance providing benefits identical to or determined by the Commissioner to be substantially equivalent to or in excess of those provided under the group policy from which conversion is made.

Where the group policy from which conversion is made restricts provision of benefits and services to, or contains incentives to use certain providers and/or facilities, the Commissioner, in making a determination as to the substantial equivalency of benefits, shall take into consideration the differences between managed care and non-managed care plans, including, but not limited to, provider system arrangements, service availability, benefit levels and administrative complexity. When the policyholder or certificate holder is no longer in the geographical area of the provider system or available services, the insurer must calculate the financial worth of the group policy and make a cash contribution toward the purchase of any health insurance policy the policyholder may select.

(5) Written application for the converted policy shall be made and the first premium due, if any, shall be paid as directed by the insurer no later than thirty-one (31) days after termination of coverage under the group policy. The converted policy shall be issued effective on the day following the termination of coverage under the group policy, and shall be renewable annually.

(6) Unless the group policy from which conversion is made replaced previous group coverage, the premium for the converted policy shall be calculated on the basis of the insured's age at inception of coverage under the group policy from which conversion is made. Where the group policy from which conversion is made replaced previous group coverage, the premium for the converted policy shall be calculated on the basis of the insured's age at inception of coverage under the group policy replaced.

(7) Continuation of coverage or issuance of a converted policy shall be mandatory, except where:

(a) Termination of group coverage resulted from an individual's failure to make any required payment of premium or contribution when due; or

(b) The terminating coverage is replaced no later than thirty-one (31) days after termination, by group

coverage effective on the day following the termination of coverage:

(i) Providing benefits identical to or benefits determined by the Commissioner to be substantially equivalent to or in excess of those provided by the terminating coverage; and

(ii) The premium for which is calculated in a manner consistent with the requirements of Paragraph (6) of this section.

(8) Notwithstanding any other provision of this section, a converted policy issued to an individual who at the time of conversion is covered by another long-term care insurance policy which provides benefits on the basis of incurred expenses, may contain a provision which results in a reduction of benefits payable if the benefits provided under the additional coverage, together with the full benefits provided by the converted policy, would result in payment of more than 100 percent of incurred expenses. Such provision shall only be included in the converted policy if the converted policy also provides for a premium decrease or refund which reflects the reduction in benefits payable.

(9) The converted policy may provide that the benefits payable under the converted policy, together with the benefits payable under the group policy from which conversion is made, shall not exceed those that would have been payable had the individual's coverage under the group policy remained in force and effect.

(10) Notwithstanding any other provision of this section, any insured individual whose eligibility for group long-term care coverage is based upon his or her relationship to another person, shall be entitled to continuation of coverage under the group policy upon termination of the qualifying relationship by death or dissolution of marriage.

(11) For the purposes of this section: a "Managed-Care Plan" is a health care or assisted living arrangement designed to coordinate patient care or control costs through utilization review, case management or use of specific provider networks.

**E. Discontinuance and Replacement.**

If a group long-term care insurance policy is replaced by another group long-term care policy issued to the same policyholder, the succeeding insurer shall offer coverage to all persons covered under the previous group policy on its date of termination. Coverage provided or offered to individuals by the insurer and the premiums charged under the new group policy:

(1) Shall not result in any exclusion for pre-existing conditions that would have been covered under the group policy being replaced; and

(2) Shall not vary or otherwise depend on the

individual's health or disability status, claim experience or use of long-term care services.

F. The premiums charged to an insured for long-term care insurance shall not increase due to either: (1) The increasing age of the insured at ages beyond sixty-five (65); or (2) The duration the insured has been covered under the policy.

**G. Electronic Enrollment for Group Policies**

(1) In the case of a group defined in 18 Del. C. § 7103(4) a. any requirement that a signature of an insured be obtained by an agent or insurer shall be deemed satisfied if:

(a) The consent is obtained by telephonic or electronic enrollment by the group policyholder or insurer. A verification of enrollment information shall be provided to the enrollee;

(b) The telephonic or electronic enrollment provides necessary and reasonable safeguards to assure the accuracy, retention and prompt retrieval of records; and

(c) The telephonic or electronic enrollment provides necessary and reasonable safeguards to assure that the confidentiality of individually identifiable information is maintained.

(2) The insurer shall make available, upon request of the Commissioner, records that will demonstrate the insurer's ability to confirm enrollment and coverage amounts.

**Section 7. Required Disclosure Provisions**

A. Renewability. Individual long-term care insurance policies shall contain a renewability provision consistent herewith. Such provision shall be appropriately captioned, shall appear on the first page of the policy, and shall clearly state the duration, where limited, of renewability and the duration of the term of coverage for which the policy is issued and for which it may be renewed, subject to Section 6., paragraph A.(1) hereof. This provision shall not apply to policies which do not contain a renewability provision, and under which the right to nonrenew is reserved solely to the policyholder.

B. Riders and Endorsements. Except for riders or endorsements by which the insurer effectuates a request made in writing by the insured under an individual long-term care insurance policy, all riders or endorsements added to an individual long-term care insurance policy after date of issue or at reinstatement or renewal which reduce or eliminate benefits or coverage in the policy shall require signed acceptance by the individual insured. After the date of policy issue, any rider or endorsement which increases benefits or cover-age with a concomitant increase in premium during the policy term must be agreed to in writing

signed by the insured, except if the increased benefits or coverage are required by law. Where a separate additional premium is charged for benefits provided in connection with riders or endorsements, such premium charge shall be set forth in the policy, rider or endorsement.

C. **Payment of Benefits.** A long-term care insurance policy which provides for the payment of benefits based on standards described as "usual and customary", "reasonable and customary", "reasonable and prevailing", or words of similar import shall include a definition of such terms and an explanation of such terms in its outline of coverage.

D. **Limitations.** If a long-term care insurance policy or certificate contains any limitations with respect to preexisting conditions, such limitations shall appear as a separate paragraph of the policy or certificate and shall be labeled as "Preexisting Condition Limitations."

E. **Other Limitations or Conditions on Eligibility for Benefits.** A long-term care insurance policy or certificate containing any limitations or conditions for eligibility, except in accordance with 18 Del. C. Section 7105, shall set forth a description of such limitations or conditions, including any required number of days or confinement, in a separate paragraph of the policy or certificate and shall label such paragraph "Limitations or Conditions of Eligibility for Benefits."

F. **Disclosure of Tax Consequences.**

(1) With regard to life insurance policies which provide an accelerated benefit for long-term care, a disclosure statement is required at the time of application for the policy or rider and at the time the accelerated benefit payment request is submitted that receipt of these accelerated benefits may be taxable, and that assistance should be sought from a personal tax advisor. The disclosure statement shall be prominently displayed on the first page of the policy or rider and any other related documents. **[This subsection shall not apply to qualified long-term care insurance contracts.]**

(2) With regard to qualified long-term care insurance policies a disclosure statement shall appear in bold print on the face of the policy and outline of coverage indicating the policy is intended to be a qualified long-term care policy under Section 7702B(b) of the Internal Revenue Code of 1996.

G. **Benefit Triggers.** Activities of daily living and cognitive impairment shall be used to measure an insured's need for long term care and shall be described in the policy or certificate in a separate paragraph and shall be labeled "Eligibility for the Payment of Benefits." Any additional benefit triggers shall also be explained in this section. If these triggers differ for different benefits, explanation of the

trigger shall accompany each benefit description. If an attending physician or other specified person must certify a certain level of functional dependency in order to be eligible for benefits, this too shall be specified.

#### Section 8.Unintentional Lapse

Each insurer offering long-term care insurance shall, as a protection against unintentional lapse, comply with the following:

(1) (a) Notice before lapse or termination. No individual long-term care policy or certificate shall be issued until the insurer has received from the applicant either a written designation of at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy or certificate for nonpayment of premium, or a written waiver dated and signed by the applicant electing not to designate additional persons to receive notice. The applicant has the right to designate at least one person who is to receive the notice of termination, in addition to the insured. Designation shall not constitute acceptance of any liability on the third party for services provided to the insured. The form used for the written designation must provide space clearly designated for listing at least one person. The designation shall include each person's full name and home address. In the case of an applicant who elects not to designate an additional person, the waiver shall state: "Protection against unintended lapse. I understand that I have the right to designate at least one person other than myself to receive notice of lapse or termination of this long-term care insurance policy for nonpayment of premium. I understand that notice will not be given until thirty (30) days after a premium is due and unpaid. I elect NOT to designate a person to receive this notice."

The insurer shall notify the insured of the right to change this written designation, no less often than once every two (2) years.

(b) When the policyholder or certificateholder pays premium for a long-term care insurance policy or certificate through a payroll or pension deduction plan, the requirements contained in Subsection (1)a. need not be met until sixty (60) days after the policyholder or certificateholder is no longer on such a payment plan. The application or enrollment form for such policies or certificates shall clearly indicate the payment plan selected by the applicant.

(c) Lapse or termination for nonpayment of premium. No individual long-term care policy or certificate shall lapse or be terminated for nonpayment of premium unless the insurer, at least thirty (30) days before the

effective date of the lapse or termination, has given notice to the insured and to those persons designated pursuant to Subsection (1)a. , at the address provided by the insured for purposes of receiving notice of lapse or termination. Notice shall be given by first class United States mail, postage prepaid; and notice may not be given until thirty (30) days after a premium is due and unpaid. Notice shall be deemed to have been given as of five (5) days after the date of mailing.

(2) Reinstatement. In addition to the requirement in Subsection (1), a long-term care insurance policy or certificate shall include a provision that provides for reinstatement of coverage, in the event of lapse if the insurer is provided proof that the policyholder or certificateholder was cognitively impaired or had a loss of functional capacity before the grace period contained in the policy expired. This option shall be available to the insured if requested within five (5) months after termination and shall allow for the collection of past due premium, where appropriate. The standard of proof of cognitive impairment or loss of functional capacity shall not be more stringent than the benefit eligibility criteria on cognitive impairment or the loss of functional capacity contained in the policy and certificate.

#### Section 89. Prohibition Against Post-Claims Underwriting

A. All applications for long-term care insurance policies or certificates except those which are guaranteed issue shall contain clear and unambiguous questions designed to ascertain the health condition of the applicant.

B. (1) If an application for long-term care insurance contains a question which asks whether the applicant has had medication prescribed by a physician, it must also ask the applicant to list the medication that has been prescribed.

(2) If the medications listed in such application were known by the insurer, or should have been known at the time of application, to be directly related to a medical condition for which coverage would otherwise be denied, then the policy or certificate shall not be rescinded for that condition.

C. Except for policies or certificates which are guaranteed issue:

(1) The following language shall be set out conspicuously and in close conjunction with the applicant's signature block on an application for a long-term care insurance policy or certificate: Caution: If your answers on this application are incorrect or untrue [company] has the right to deny benefits or rescind your policy.

(2) The following language, or language substantially similar to the following, shall be set out conspicuously on the long-term care insurance policy or

certificate at the time of delivery: Caution: The issuance of this long-term care insurance [policy] [certificate] is based upon your responses to the questions on your application. A copy of your [application] [enrollment form] [is enclosed] [was retained by you when you applied]. If your answers are incorrect or untrue, the company has the right to deny benefits or rescind your policy. The best time to clear up any questions is now, before a claim arises! If, for any reason, any of your answers are incorrect, contact the company at this address: [insert address].

(3) Prior to issuance of a long-term care insurance policy or certificate to an applicant age eighty (80) or older, the insurer shall obtain one of the following:

- (a) A report of a physical examination,
- (b) An assessment of functional capacity,
- (c) An attending physician's statement, or
- (d) Copies of medical records.

D. A copy of the completed application or enrollment form (whichever is applicable) shall be delivered to the insured no later than at the time of delivery of the policy or certificate unless it was retained by the applicant at the time of application.

E. Every insurer or other entity selling or issuing long-term care insurance benefits shall maintain a record of all policy or certificate rescissions, both state and countrywide, except those which the insured voluntarily effectuated and shall annually furnish this information to the Insurance Commissioner in the form prescribed by the National Association of Insurance Commissioners.

#### Section 910. Minimum Standards for Home Health and Community Care Benefits in Long-Term Care Insurance Policies

A. A long-term care insurance policy or certificate shall not, if it provides benefits for home health or community care services, limit or exclude benefits;

(1) By requiring that the insured/claimant would need skilled care in a skilled nursing facility if home health care services were not provided.

(2) By requiring that the insured/claimant first or simultaneously receive nursing and/or therapeutic services in a home, community or institutional setting before home health care services are covered.

(3) By limiting eligible services to services provided by registered nurses or licensed practical nurses.

(4) By requiring that a nurse or therapist provide services covered by the policy that can be provided by a home health aide, or other licensed or certified home care worker acting within the scope of his or her licensure or certification.

(5) By excluding coverage for personal care services provided by a home health aide;

(6) By requiring that the provision of home health care services be at a level of certification or licensure greater than that required by the eligible service;

(7) By requiring that the insured/claimant have an acute condition before home health care services are covered.

(8) By limiting benefits to services provided by Medicare-certified agencies or providers;

(9) —By excluding coverage for adult day care services.

B. A long-term care insurance policy or certificate, if it provides for home health or community care services, shall provide total home health or community care coverage that is a dollar amount equivalent to at least one-half of one year's coverage available for nursing home benefits under the policy or certificate. This requirement shall not apply to policies or certificates issued to residents of continuing care retirement communities.

C. Home health care coverage may be applied to non-home health care benefits provided in the policy or certificate when determining the maximum coverage under the terms of the policy or certificate.

#### **Section 4011. Requirement to Offer Inflation Protection**

A. No insurer may offer a long-term care insurance policy unless the insurer also offers to the policyholder the option to purchase a policy that provides for benefit levels to increase with benefit maximums or reasonable durations which are meaningful to account for reasonably anticipated increases in the costs of long-term services covered by the policy. Insurers must offer to each policyholder, at the time of purchase, the option to purchase a policy with an inflation protection feature no less favorable than one of the following:

(1) Increases benefit levels annually in a manner so that the increases are compounded annually at a rate not less than five percent (5%);

(2) Guarantees the insured individual the right to periodically increase benefit levels without providing evidence of insurability or health status so long as the option for the previous period has not been declined. The amount of additional benefit shall be no less than the difference between the existing policy benefit and that benefit compounded annually at a rate of at least five percent (5%) for the period beginning with the purchase of the existing benefit and extended until the year in which the offer is made; or

(3) Covers a specific percentage of actual or

reasonable charges and does not include a maximum specified indemnity amount of limit.

B. Where the policy is issued to a group, the required offer in Subsection A above shall be made to the group policyholder; except, if the policy is issued to a group defined in 18 Del. C., Section 7103.(4), other than to a continuing care retirement community, the offering shall be made to each proposed certificate holder.

C. The offer in Subsection A above shall not be required of life insurance policies or riders containing accelerated long-term care benefits.

D. Insurers shall include the following information in or with the outline of coverage:

(1) A graphic comparison of the benefit levels of a policy that increases benefits over the policy period with a policy that does not increase benefits. The graphic comparison shall show benefit levels over at least a twenty (20) year period.

(2) Any expected premium increases or additional premiums to pay for automatic or optional benefit increases. An insurer may use a reasonable hypothetical, or a graphic demonstration, for the purposes of this disclosure.

E. Inflation protection benefit increases under a policy which contains such benefits shall continue without regard to an insured's age, claim status or claim history, or the length of time the person has been insured under the policy.

F. An offer of inflation protection which provides for automatic benefit increases shall include an offer of a premium which the insurer expects to remain constant. Such offer shall disclose in a conspicuous manner that the premium may change in the future unless the premium is guaranteed to remain constant.

G. (1) Inflation protection as provided in subsection A(1) of this section shall be included in a long-term care insurance policy unless an insurer obtains a rejection of inflation protection signed by the policyholder as required in this subsection.

(2) The rejection shall be considered part of the application and shall state:

I have reviewed the outline of coverage and the graphs that compare the benefits and premiums of this policy with and without inflation protection. Specifically, I have reviewed Plans ----- and I reject inflation protection.

#### **Section 412. Requirements for Replacement**

A. Application forms shall include the following questions designed to elicit information as to whether, as of the date of the application, the applicant has another long-term care insurance policy or certificate in force or whether a long-term care policy or certificate is intended to replace any

accident and sickness or long-term care policy or certificate presently in force. A supplementary application or other form to be signed by the applicant and the agent, except where the coverage is sold without an agent, containing such questions may be used. With regard to a replacement policy issued to a group defined in 18 Del. C., 7103 (4), the following questions may be modified only to the extent necessary to elicit information about health or long-term care insurance policies other than the group policy being replaced; provided, however, that the certificate holder has been notified of the replacement.

(1) Do you have another long-term care insurance policy or certificate in force (including health care services contract, health maintenance organization contract)?

(2) Did you have another long-term care insurance policy or certificate in force during the last twelve (12) months?

(a) If so, with which company?

(b) If that policy lapsed, when did it lapse?

(3) Are you covered by Medicaid?

(4) Do you intend to replace any of your medical or health insurance with this policy {certificate}?

B. Agents shall list any other health insurance policies they have sold to the applicant.

(1) List policies sold which are still in force.

(2) List policies sold in the last five (5) years which are no longer in force.

C. Solicitations Other than Direct Response. Upon determining that a sale will involve replacement, an insurer; other than an insurer using direct response solicitation methods, or its agent; shall furnish the applicant, prior to issuance or delivery of the individual long-term care insurance policy, a notice regarding replacement of accident and sickness or long-term care coverage. One copy of such notice shall be retained by the applicant and an additional copy signed by the applicant shall be retained by the insurer. The required notice shall be provided in the following manner:

**NOTICE TO APPLICANT REGARDING  
REPLACEMENT OF INDIVIDUAL ACCIDENT AND  
SICKNESS OR LONG-TERM CARE INSURANCE**

According to [your application] [information you have furnished], you intend to lapse or otherwise terminate existing accident and sickness or long-term care insurance and replace it with an individual long term care insurance policy to be issued by [company name] Insurance Company. Your new policy provides thirty (30) days within which you may decide, without cost, whether you desire to keep the

policy. For your own information and protection, you should be aware of and seriously consider certain factors which may affect the insurance protection available to you under the new policy.

You should review this new coverage carefully, comparing it with all accident and sickness or long-term care insurance coverage you now have, and terminate your present policy only if, after due consideration, you find that purchase of this long-term care insurance is a wise decision.

**STATEMENT TO APPLICANT BY AGENT [BROKER  
OR OTHER REPRESENTATIVE]:**

(Use additional sheets, as necessary).

I have reviewed your current medical or health insurance coverage. I believe the replacement of insurance involved in this transaction materially improves your position. My conclusion has taken into account the following considerations, which I call to your attention:

1. Health conditions which you may presently have (preexisting conditions), may not be immediately or fully covered under the new policy. This could result in denial or delay in payment of benefits under the new policy, whereas a similar claim might have been payable under your present policy.

2. State law provides that your replacement policy or certificate may not contain new pre-existing conditions or probationary periods.

3. If you are replacing existing long-term care insurance coverage, you may wish to secure the advice of your present insurer or its agent regarding the proposed replacement of your present policy. This is not only your right, but it is also in your best interest to make sure you understand all the relevant factors involved in replacing your present coverage.

4. If, after due consideration, you still wish to terminate your present policy and replace it with new coverage, be certain to truthfully and completely answer all questions on the application concerning your medical health history. Failure to include all material medical information on an application may provide a basis for the company to deny and future claims and to refund your premium as though your policy had never been in force. After the application has been completed and before you sign it, reread it carefully to be certain that all information has been properly recorded.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Agent's Signature)

The above "Notice to the Applicant" was delivered to me on:

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Applicant's Signature)

D. Direct Response Solicitations. Insurers using direct response solicitation methods shall deliver a notice regarding replacement of accident and sickness or long-term care coverage to the applicant upon issuance of the policy. The required notice shall be provided in the following manner:

NOTICE TO APPLICANT REGARDING REPLACEMENT OF INDIVIDUAL ACCIDENT AND SICKNESS OR LONG-TERM CARE INSURANCE

According to [your application] [information you have furnished], you intend to lapse or otherwise terminate existing accident and sickness or long-term care insurance and replace it with the long-term care insurance policy delivered herewith issued by [company name] Insurance Company. Your new policy provides thirty (30) days within which you may decide, without cost, whether you desire to keep the policy. For your own information and protection, you should be aware of and seriously consider certain factors which may affect the insurance protection available to you under the new policy.

You should review this new coverage carefully, comparing it with all accident and sickness or long-term care insurance coverage you now have, and terminate your present policy only if, after due consideration, you find that purchase of this long-term care coverage is a wise decision.

1. Health conditions which you may presently have (preexisting conditions), may not be immediately or fully covered under the new policy. This could result in denial or delay in payment of benefits under the new policy, whereas a similar claim might have been payable under your present policy.

2. State law provides that your replacement policy or certificate may not contain new pre-existing conditions or probationary periods.

3. If you are replacing existing long-term care insurance coverage, you may wish to secure the advice of your present insurer or its agent regarding the proposed replacement of your present policy. This is not only your right, but it is also in your best interest to make sure you understand all the relevant factors involved in replacing your present coverage.

4. [To be included only if the application is attached to the policy.] If, after due consideration, you still wish to

terminate your present policy and replace it with new coverage, read the copy of the application attached to your new policy and be sure that all questions are answered fully and correctly. Omissions or misstatements in the application could cause an otherwise valid claim to be denied. Carefully check the application and write to [company name and address] within (30) thirty days if any information is not correct and complete, or if any past medical history has been left out of the application.

\_\_\_\_\_  
(Company Name)

E. Where replacement is intended, the replacing insurer shall notify, in writing, the existing insurer of the proposed replacement. The existing policy shall be identified by the name of the insurer, name of the insured and policy number or address including zip code. Such notice shall be made within five (5) working days from the date the application is received by the insurer or the date the policy is issued, whichever is sooner.

Section 213. Replacement Requirements

A. Every insurer shall maintain records for each Delaware-licensed agent of that agent's amount of replacement sales as a percentage of the agent's total annual sales and the amount of lapses of long-term care insurance policies sold by the agent as a percent of the agent's total annual sales.

B. Each insurer shall report annually by June 30 the ten precedent (10%) of its Delaware-licensed agents with the greatest percentages of lapses and replacements as measured by subsection A. above.

C. Reported replacement and lapse rates do not alone constitute a violation of insurance laws or necessarily imply wrongdoing. The reports are for the purpose of reviewing more closely agent activities regarding the sale of long-term care insurance.

D. Every entity providing long-term care insurance in this state shall file annually as an attachment to its annual statement an exhibit that discloses the total number of long-term care insurance policies, by form number, in force in this state and the total number of policies, by form number, that have lapsed over the previous five years. Companies must provide in-force policy and lapsed policy information in the following manner:

POLICY FORM # \_\_\_\_\_

| SOLD | LAPSED | LAPSED | LAPSED | LAPSED | LAPSED | TOTAL |
|------|--------|--------|--------|--------|--------|-------|
| 1985 | 1985   | 1986   | 1987   | 1988   | 1989   |       |
| 100  | 6      | 21     | 11     | 32     | 14     | 84    |

|             |           |            |            |            |    |
|-------------|-----------|------------|------------|------------|----|
| 1986<br>100 | 1986<br>6 | 1987<br>11 | 1988<br>21 | 1989<br>32 | 70 |
| 1987<br>100 |           | 1987<br>6  | 1988<br>21 | 1989<br>28 | 50 |
| 1988<br>100 |           |            | 1988<br>6  | 1989<br>14 | 20 |
| 1989<br>100 |           |            |            | 1989<br>6  | 6  |

E. Every insurer shall report, annually by June 30 the number of replacement policies sold as a percentage of its total annual sales and as a percentage of its total number of policies in force as of the preceding calendar year.

F. For purposes of this section, "policy" shall mean only long-term care insurance and "report" shall mean on a statewide basis.

**Section 4314.Licensing**

No agent is authorized to market, sell, solicit or otherwise contact any person for the purpose of marketing long-term care insurance unless the agent has demonstrated his or her knowledge of long-term care insurance and the appropriateness of such insurance by passing a test required by this state and maintaining appropriate licenses. ~~For purposes of this section:~~

~~A. The examination for licensure as a health insurance agent or broker shall be expanded to include a minimum of at least ten (10) questions in the area of long-term care insurance.~~

[(1)]Agents shall comply with the licensing provisions contained in 18 Del. C. §§ 1716(a)(4) and 1725(a) relating to lines of authority and examinations, respectively.

~~B. To continue to sell long-term care insurance policies or certificates, agents and broker shall be required in addition to current annual Continuing Education Unit requirements to successfully complete an additional three (3) hours of long-term care insurance specific Continuing Education coursework, to be administered by the Delaware Insurance Department.~~

~~C. [(2)]Insurers shall submit to the Delaware Insurance Department, no later than May 1 of each year, a complete list of every Delaware licensed agent or broker who sold a long-term care insurance policy or certificate during the previous calendar year.~~

**Section 4415.Discretionary Powers of Commissioner**

The Commissioner may, upon written request and after

an administrative hearing, issue an order to modify or suspend a specific provision or provisions of this regulation with respect to a specific long-term care insurance policy or certificate upon a written finding that:

A. The modification or suspension would be in the best interest of the insureds; and

B. The purposes to be achieved could not be effectively or efficiently achieved without the modification or suspension; and

C. (1) The modification or suspension is necessary to the development of an innovative and reasonable approach for insuring long-term care; or

(2) The policy or certificate is to be issued to residents of a life care or continuing care retirement community or some other residential community for the elderly and the modification or suspension is reasonable related to the special needs or nature of such a community; or

(3) The modification or suspension is necessary to permit long-term care insurance to be sold as part of, or in conjunction with, another insurance product.

**Section 4516.Reserve Standards**

A. When long-term care benefits are provided through the acceleration of benefits under group or individual life policies or riders to such policies, policy reserves for such benefits shall be determined in accordance with 18 Del. C. Sec. 1113. Claim reserves must also be established in the case when such policy or rider is in claim status. Reserves for policies and riders subject to this subsection should be based on the multiple decrement model utilizing all relevant decrements except for voluntary termination rates. Single decrement approximations are acceptable if the calculation produces essentially similar reserves, if the reserve is clearly more conservative, or if the reserve is immaterial. The calculations may take into account the reduction in life insurance benefits due to the payment of long-term care benefits. However, in no event shall the reserves for the long-term care benefit and the life insurance benefit be less than the reserves for the life insurance benefit assuming no long-term benefit. In the development and calculation of reserves for policies and riders subject to this subsection, due regard shall be given to the applicable policy provisions, marketing methods, administrative procedures and all other considerations which have an impact on projected claim costs, including, but not limited to, the following:

- (1) Definition of insured events;
- (2) Covered long-term care facilities;
- (3) Existence of home convalescence coverage;
- (4) Definition of facilities;

- (5) Existence or absence of barriers to eligibility;
- (6) Premium waiver provision;
- (7) Renewability;
- (8) Ability to raise premiums;
- (9) Marketing method;
- (10) Underwriting procedures;
- (11) Claims adjustment procedures;
- (12) Waiting period;
- (13) Maximum benefit;
- (14) Availability of eligible facilities;
- (15) Margins in claim costs;
- (16) Optional nature of benefit;
- (17) Delay in eligibility for benefit;
- (18) Inflation protection provisions; and
- (19) Guaranteed insurability options.

Any applicable valuation morbidity table shall be certified as appropriate as a statutory valuation table by a member of the American Academy of Actuaries.

B. When long-term care benefits are provided other than as in Subsection A above, reserves shall be determined in accordance with 18 Del. C. Sec. 1108.

#### Section ~~16~~17. Loss Ratio

A. Benefits under individual long-term care insurance policies and group policies with fewer than 250 insureds shall be deemed reasonable in relation to premiums provided the expected loss ratio is at least sixty percent, calculated in a manner which provides for adequate reserving of the long-term care insurance risk. Long-term care benefits provided through the acceleration of the death benefit under a life insurance policy or annuity, where the charge or the premium for the acceleration benefit is identifiable and where the payment of such long-term care benefits cannot result in the decrease of the total amount of benefits payable under the policy (i.e., long-term care benefits plus balance payable upon death), shall be exempt from this section. In evaluating the expected loss ratio, due consideration shall be given to all relevant factors, including:

- ~~[(1)A.]~~ Statistical credibility of incurred claims experience and earned premiums;
- ~~[(2)B.]~~ The period for which rates are computed to provide coverage;
- ~~[(3)C.]~~ Experienced and projected trends;
- ~~[(4)D.]~~ Concentration of experience within early policy duration;
- ~~[(5)E.]~~ Expected claim fluctuation;
- ~~[(6)F.]~~ Experience refunds, adjustments or dividends;
- ~~[(7)G.]~~ Renewability features;

- ~~[(8)H.]~~ All appropriate expense factors;
- ~~[(9)I.]~~ Interest;
- ~~[(10)J.]~~ Experimental nature of this coverage;
- ~~[(11)K.]~~ Policy reserves;
- ~~[(12)L.]~~ Mix of business by risk classification; and
- ~~[(13)M.]~~ Product features such as long elimination periods, high deductibles and high maximum limits.

B. Every entity providing long-term care insurance in this State shall file annually its rates, rating schedule and supporting documentation including ratios of incurred losses to earned premiums by number of years of policy duration demonstrating that it is in compliance with the foregoing applicable loss ratio standards and that the period for which the policy is rated is reasonable in accordance with accepted actuarial principles and experience.

For purposes of this section, policy forms shall be deemed to comply the loss ratio standards if:

~~[(1i)]~~ for the most recent year, the ratio of the incurred losses to earned premiums for policies or certificates which have been in force for three years or more is greater than or equal to the applicable percentages contained in this section; and

~~[(2ii)]~~ the expected losses in relation to premiums over the entire period for which the policy is rated comply with the requirements of this section. An expected third-year loss ratio which is greater than or equal to the applicable percentage shall be demonstrated for policies or certificates in force less than three years.

#### Section ~~17~~18. Filing Requirement

Prior to an insurer or similar organization offering group long-term care insurance to a resident of this state pursuant to 18 Del. C. Section 7104 it shall file with the Commissioner evidence that the group policy or certificate thereunder has been approved by a state having statutory or regulatory long-term care insurance requirements substantially similar to those adopted in this state.

#### Section ~~18~~19. Standard Format Outline of Coverage

This section of the regulation implements, interprets and makes specific, the provisions of 18 Del. C. Section 7105, in prescribing a standard format and the content of an outline of coverage.

~~A-~~(1) The outline of coverage shall be a free-standing document, using no smaller than ten point type.

~~B-~~(2) The outline of coverage shall contain no material of an advertising nature.

~~C-~~(3) Text which is capitalized or underscored in the standard format outline of coverage may be emphasized by other means which provide prominence equivalent to such

capitalization or underscoring.

⊖(4) Use of the text and sequence of text of the standard format outline of coverage is mandatory, unless otherwise specifically indicated.

⊖(5) Format for outline of coverage;

[COMPANY NAME]

[ADDRESS - CITY & STATE]

[TELEPHONE NUMBER]

LONG-TERM CARE INSURANCE

OUTLINE OF COVERAGE

[Policy Number or Group Master Policy and Certificate Number]

[Except for policies or certificates which are guaranteed issue, the following cautionary statement, or language substantially similar, must appear on the outline of coverage.]

Caution: The issuance of this long-term care insurance [policy] [certificate] is based upon your responses to the questions on your application. A copy of your [application] [enrollment form] [is enclosed] [was retained by you when your applied]. If your answers are incorrect or untrue, the company has the right to deny benefits or rescind your policy. The best time to clear up any questions is now, before a claim arises! If, for any reason, any of your answers are incorrect, contact the company at this address: [insert address].

1. This policy is [an individual policy of insurance] ([a group policy] which was issued in the [indicate jurisdiction in which group policy was issued]).

2. PURPOSE OF OUTLINE OF COVERAGE. This outline of coverage provides a very brief description of the important features of the policy. You should compare this outline of coverage to outlines of coverage for other policies available to you.

This is not an insurance contract, but only a summary of coverage. Only the individual or group policy contains governing contractual provisions. This means that the policy or group policy sets forth in detail the rights and obligations of both you and the insurance company. Therefore, if you purchase this coverage, or any other coverage, it is important that you READ YOUR POLICY (OR CERTIFICATE) CAREFULLY!

3. TERMS UNDER WHICH THE POLICY OR CERTIFICATE MAY BE RETURNED AND PREMIUM REFUNDED.

(a) [Provide a brief description of the right to

return--"free look" provision of the policy.]

(b) [Include a statement that the policy either does or does not contain provisions providing for a refund or partial refund of premium upon the death of an insured or surrender of the policy or certificate. If the policy contains such provisions, include a description of them.]

4. THIS IS NOT MEDICARE SUPPLEMENT COVERAGE. If you are eligible for Medicare, review the Medicare Supplement Buyer's Guide provided by the insurance company.

(a) [For agents] Neither [insert company name] nor its agents represent Medicare, the federal government or any state government.

(b) [For direct response] [insert company name] is not representing Medicare, the federal government or any state government.

5. LONG-TERM CARE COVERAGE. Policies of this category are designed to provide coverage for one or more necessary or medically necessary diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care services, provided in a setting other than an acute care unit of a hospital, such as in a nursing home, in the community or in the home.

This policy provides coverage in the form of a fixed dollar indemnity benefit for covered long-term care expenses, subject to policy [limitations] [waiting periods] and [coinsurance] requirements. [Modify this paragraph if the policy is not an indemnity policy.]

6. BENEFITS PROVIDED BY THIS POLICY.

(a) [Covered services, related deductible(s), waiting periods, elimination periods and benefit maximums.]

(b) [Institutional benefits, by skill level.]

(c) [Non-institutional benefits, by skill level.]

[Any benefit ~~screens~~ triggers must be explained in this section. If these ~~screen~~triggers differ for different benefits, explanation of the ~~screen~~ trigger should accompany each benefit description. If an attending physician or other specified person must certify a certain level of functional dependency in order to be eligible for benefits, this too must be specified. If activities -of daily living (ADLs) are used to measure an insured's need for long-term care, then these qualifying criteria or ~~screens~~ triggers must be explained.]

(d) Activities of daily living and cognitive impairment shall be used to measure an insured's need for long-term care and must be defined and described as part of the outline of coverage.

7. LIMITATIONS AND EXCLUSIONS.

[Describe:

(a) Preexisting conditions;

- (b) Non-eligible facilities/provider;
- (c) Non-eligible levels of care (e.g., unlicensed providers, care of treatment provided by a family member, etc.);
- (d) Exclusions/exceptions;
- (e) Limitations.]

[This section should provide a brief specific description of any policy provisions which limit, exclude, restrict, reduce, delay, or in any other manner operate to qualify payment of the benefits described in (6) above.]

**THIS POLICY MAY NOT COVER ALL THE EXPENSES ASSOCIATED WITH YOUR LONG-TERM CARE NEEDS.**

8. RELATIONSHIP OF COST OF CARE AND BENEFITS. Because the costs of long-term care services will likely increase over time, you should consider whether and how the benefits of this plan may be adjusted. [As applicable, indicate the following:

- (a) That the benefit level will not increase over time;
- (b) Any automatic benefit adjustment provisions;
- (c) Whether the insured will be guaranteed the option to buy additional benefits and the basis upon which benefits will be increased over time if not only by a specified amount or percentage;
- (d) If there is such a guarantee, include whether additional underwriting or health screening will be required, the frequency and amounts of the upgrade options, and any significant restrictions or limitations;
- (e) And finally, describe whether there will be any additional premium charge imposed, and how that is to be calculated.]

9. TERMS UNDER WHICH THE POLICY (OR CERTIFICATE) MAY BE CONTINUED IN FORCE OR DISCONTINUED.

- (a) Describe the policy renewability provisions;
- (b) For group coverage, specifically describe continuation/conversion provisions applicable to the certificate and group policy;
- (c) Describe waiver of premium provisions or state that there are not such provisions;
- (d) State whether or not the company has a right to change premium, and if such a right exists, describe clearly and concisely each circumstance under which premium may change.

10. ALZHEIMER'S DISEASE AND OTHER ORGANIC BRAIN DISORDERS.

[State that the policy provides coverage for insureds clinically diagnosed as having Alzheimer's disease or related

degenerative and dementing illnesses. Specifically describe each benefit screen or other policy provision which provides preconditions to the availability of policy benefits for such an insured.]

11. PREMIUM.

- [(a) State the total annual premium for the policy;
- (b) If the premium varies with an applicant's choice among benefit options, indicate the portion of annual premium which corresponds to each benefit option.]

12. ADDITIONAL FEATURES.

- [(a) Indicate if medical underwriting is used;
- (b) Describe other important features.]

~~Section 4920.~~ Filing Requirements for Advertising

Prior to use, every insurer, health care service plan or other entity providing long-term care insurance in this State shall provide a copy of any long-term care insurance advertisement intended for use in this State whether through written, radio or television medium to the Insurance Commissioner of the State Delaware for review and approval by the Commissioner.

~~Section 2021.~~ Standards for Marketing

A. Every insurer, health care service plan or other entity marketing long-term care insurance coverage in this state, directly or through its producers, shall:

- (1) Establish marketing procedures to assure that any comparison of policies by its agents or other producers will be fair and accurate.
- (2) Establish marketing procedures to assure excessive insurance is not sold or issued.
- (3) Display prominently by type, stamp or other appropriate means, on the first page of the outline of coverage and policy, the following: "Notice to Buyer: This policy may not cover all of the costs associated with long-term care incurred by the buyer during the period of coverage. The buyer is advised to review carefully all policy limitations."
- (4) Inquire and otherwise make every reasonable effort to identify whether a prospective applicant or enrollee for long-term care insurance already has accident and sickness or long-term care insurance and the types and amounts of any such insurance.
- (5) Every insurer or entity marketing long-term care insurance shall establish auditable procedures for verifying compliance with this subsection~A.

(6) If the state of Delaware is the state in which the policy or certificate is delivered or issued for delivery, the insurer shall, at solicitation, provide written notice to the prospective policyholder or certificate holder that the ~~Senior~~

~~Outreach Advisory Resource Program (SOAR) Elderinfo Program~~, a senior counseling program approved by the Commissioner, is available and the name, address and telephone number of the ~~SOAR Elderinfo~~ Program.

B. In addition to the practices prohibited in 18 Del. C., Chapter 23, Unfair Trade Practices, the following acts and practices are prohibited:

(1) Twisting. Knowingly making any misleading representation or incomplete or fraudulent comparison of any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on or convert any insurance policy or to take out a policy of insurance with another insurer.

(2) High Pressure Tactics. Employing any method of marketing having the effect of or tending to induce the purchase of insurance through force, fright, threat, whether explicit or implied, or undue pressure to purchase or recommend the purchase of insurance.

(3) Cold lead advertising. Making use directly or indirectly of any method of marketing which fails to disclose in a conspicuous manner that a purpose of the method of marketing is solicitation of insurance and that contact will be made by an insurance agent or insurance company.

#### Section 22.Suitability

A. This section shall not apply to life insurance policies that accelerate benefits for long-term care.

B. Every insurer, health care service plan or other entity marketing long-term care insurance ("insurer") shall:

(1) Develop and use suitability standards to determine whether the purchase or replacement of long-term care insurance is appropriate for the needs of the applicant;

(2) Train its agents in the use of its suitability standards; and

(3) Maintain a copy of its suitability standards and make them available for inspection upon request by the Commissioner.

C. (1) To determine whether the applicant meets the standards developed by the insurer, the agent and insurer shall develop procedures that take the following into consideration:

(a) The ability to pay for the proposed coverage and other pertinent financial information related to the purchase of the coverage;

(b) The applicant's goals or needs with respect to long-term care and the advantages and disadvantages of insurance to meet these goals or needs; and

(c) The values, benefits and costs of the applicant's existing insurance, if any, when compared to the

values, benefits and costs of the recommended purchase or replacement.

(2) The insurer, and where an agent is involved, the agent shall make reasonable efforts to obtain the information set out in Paragraph (1) above. The efforts shall include presentation to the applicant, at or prior to application, the "Long-Term Care Insurance Personal Worksheet." The personal worksheet used by the issuer shall contain, at a minimum, the information in the format contained in Appendix B, in not less than twelve (12) point type. The insurer may request the applicant to provide additional information to comply with its suitability standards. A copy of the insurer's personal worksheet shall be filed with the Commissioner.

(3) A completed personal worksheet shall be returned to the insurer prior to the insurer's consideration of the applicant for coverage, except the personal worksheet need not be returned for sales of employer group long-term care insurance to employees and their spouses.

(4) The sale or dissemination outside the company or agency by the issuer or agent of information obtained through the personal worksheet in Appendix B is prohibited.

D. The insurer shall use the suitability standards it has developed pursuant to this section in determining whether issuing long-term care insurance coverage to an applicant is appropriate.

E. Agents shall use the suitability standards developed by the insurer in marketing long-term care insurance.

F. At the same time as the personal worksheet is provided to the applicant, the disclosure form entitled "Things You Should Know Before You Buy Long-Term Care Insurance" shall be provided. The form shall be in the format contained in Appendix C, in not less than twelve (12) point type.

G. If the issuer determines that the applicant does not meet its financial suitability standards, or if the applicant has declined to provide the information, the issuer may reject the application. In the alternative, the issuer shall send the applicant a letter similar to Appendix D. However, if the applicant has declined to provide financial information, the issuer may use some other method to verify the applicant's intent. Either the applicant's returned letter or a record of the alternative method of verification shall be made part of the applicant's file.

H. The insurer shall report annually to the Commissioner the total number of applications received from residents of this state, the number of those who declined to provide information on the personal worksheet, the number of applicants who did not meet the suitability standards, and the number of those who chose to confirm

after receiving a suitability letter.

Section 23. Standards for Benefit Triggers

A. A long-term care insurance policy shall condition the payment of benefits on a determination of the insured's ability to perform activities of daily living and on cognitive impairment. Eligibility for the payment of benefits shall not be more restrictive than requiring either a deficiency in the ability to perform not more than three (3) of the activities of daily living or the presence of cognitive impairment.

B. (1) Activities of daily living shall include at least the following as defined in Section 5 and in the policy:

- (a) Bathing;
- (b) Continence;
- (c) Dressing;
- (d) Eating;
- (e) Toileting; and
- (f) Transferring;

(2) Insurers may use activities of daily living to trigger covered benefits in addition to those contained in Paragraph (1) as long as they are defined in the policy.

C. An insurer may use additional provisions for the determination of when benefits are payable under a policy or certificate; however the provisions shall not restrict, and are not in lieu of, the requirements contained in Subsections A and B.

D. For purposes of this section the determination of a deficiency shall not be more restrictive than:

(1) Requiring the hands-on assistance of another person to perform the prescribed activities of daily living; or

(2) If the deficiency is due to the presence of a cognitive impairment, supervision or verbal cueing by another person is needed in order to protect the insured or others.

E. Assessments of activities of daily living and cognitive impairment shall be performed by licensed or certified professionals, such as physicians, nurses or social workers.

F. Long term care insurance policies shall include a clear description of the process for appealing and resolving benefit determinations.

G. The requirements set forth in this section shall be effective (12 months after adoption of this provision) and shall apply as follows:

(1) Except as provided in Paragraph (2), the provisions of this section apply to a long-term care policy issued in this state on or after the effective date of the amended regulation.

(2) For certificates issued on or after the effective date of this section, under a group long-term care insurance

policy as defined in 18 Del. C. § 7103(4)a. [effective, the provisions of this section shall not apply.

Section-24.24. Prohibition Against Pre-Existing Conditions and Probationary Periods in Replacement Policies or Certificates

If a long-term care insurance policy or certificate replaces another long-term care insurance policy or certificate, the replacing insurer shall waive any time periods applicable to pre-existing conditions and probationary periods in the new long-term care insurance policy or certificate to the extent that similar exclusions have been satisfied under the original policy.

Section 22.25. Requirement to Deliver Shopper's Guide

A. A long-term care insurance shopper's guide in the format developed by the National Association of Insurance Commissioners, or one developed or approved by the Commissioner, shall be provided to all prospective applicants of a long-term care insurance policy or certificate.

(1) In the case of agent solicitations, an agent must deliver the shopper's guide prior to the presentation of an application or enrollment form.

(2) In the case of direct response solicitations, the shopper's guide must be presented in conjunction with any application or enrollment form.

B. Life insurance policies or riders containing accelerated long-term care benefits are not required to furnish the above-referenced guide, but shall furnish the policy summary required under 18 Del. C., Section 7105 (j).

Section 23.26. Requirement to Offer Nonforfeiture Benefit

A. No policy or certificate may be delivered or issued for delivery in this state unless the insurer also offers to the policyholder or certificateholder the option to purchase a policy that provides for nonforfeiture benefits to the defaulting or lapsing policyholder or certificateholder.

This section does not apply to life insurance policies or riders containing accelerated long-term care benefits.

(1) For purpose of this section, attained age rating is defined as a schedule of premiums starting from the issue date which increases with increasing age at least one percent per year to age fifty (50), and at least three percent (3%) per year beyond age fifty (50).

(2) For purposes of this section, the nonforfeiture benefit shall be a shortened benefit period providing paid-up long-term care insurance coverage after lapse. The same benefits (amounts and frequency in effect at the time of lapse but not increased thereafter) will be payable for a qualifying

claim, but the lifetime maximum dollars or days of benefit shall be determined as specified in Paragraph (3).

(3) The standard nonforfeiture credit will be equal to 100 percent of the sum of all premiums paid, including the premiums paid prior to any changes in benefits. The insurer may offer additional shortened benefit period options, as long as the benefits for each duration equal or exceed the standard nonforfeiture credit for that duration. However, the minimum nonforfeiture credit shall not be less than thirty (30) times the daily nursing home benefit at the time of lapse. In either event, the calculation of the nonforfeiture credit is subject to the limitation of Subsection B.

(4) No policy or certificate shall begin a nonforfeiture benefit later than the end of the third year following the policy or certificate issue date except that for a policy or certificate with attained age rating, the nonforfeiture benefit shall begin on the earlier of:

(a) The end of the tenth year following the policy or certificate issue date; or

(b) The end of the second year following the date the policy or certificate is no longer subject to attained age rating.

(5) Nonforfeiture credits may be used for all care and services qualifying for benefits under the terms of the policy or certificate, up to the limits specified in the policy or certificate.

B. All benefits paid by the insurer while the policy or certificate is in premium paying status and in the paid up status will not exceed the maximum benefits which would have been payable if the policy or certificate had remained in premium paying status.

C. There shall be no difference in the minimum nonforfeiture benefit as required under this section for group and individual policies.

D. The requirements set forth in this section shall become effective on May 1, 1997, except for certificates issued on or after the effective date of this section under a group long-term care insurance policy as defined in 18 Del. C., Section 7103, which policy was in force at the time this amended regulation became effective.

E. Premiums charged for a policy or certificate containing nonforfeiture benefits shall be subject to the loss ratio requirements of Section 16 treating the policy as a whole.

F. (1) A nonforfeiture benefit as provided in subsection A.(2) and (3) of this section shall be included in a long-term care insurance policy or certificate unless an insurer obtains a rejection of a nonforfeiture benefit signed by the policyholder or certificateholder as required in this section.

(2) The rejection shall be considered part of the application and shall state: I have reviewed the outline of coverage and the nonforfeiture benefit as described therein. Specifically, I have reviewed Plan \_\_\_\_\_ and I reject the nonforfeiture benefit.

G. Nonforfeiture benefits for qualified long-term care policies shall meet the following requirements:

(1) The nonforfeiture provision shall be appropriately captioned:

(2) The nonforfeiture provision shall provide a benefit available in the event of a default in the payment of any premiums and shall state that the amount of the benefit may be adjusted subsequent to being initially granted only as necessary to reflect changes in claims, persistency and interest as reflected in changes in rates for premium paying contracts approved by the Secretary of the Treasury for the same contract form; and

(3) The nonforfeiture provision shall provide at least one of the following:

(a) Reduced paid-up insurance;

(b) Extended term insurance;

(c) Shortened benefit insurance; or

(d) Other similar offerings approved by the Commissioner.

H. If the required offer of a nonforfeiture benefit is rejected, the insurer shall provide the contingent benefit upon lapse described below. In the event that a group policyholder elects to make the nonforfeiture benefit an option to the certificateholder, a certificate shall provide either the nonforfeiture benefit or the contingent benefit upon lapse.

(1) The contingent benefit on lapse shall be triggered every time an insurer increases the premium rates to a level which results in a cumulative increase of the annual premium set forth below based on the insured's issue age, and the policy or certificate lapses within 120 days of the due date of the premium so increased. Unless otherwise required, policyholders shall be notified at least thirty (30) days prior to the due date of the premium reflecting the rate increase.

Triggers for a Substantial Premium Increase  
Percent Increase Over

| <u>Issue Age</u>    | <u>Initial Premium</u> |
|---------------------|------------------------|
| <u>29 and under</u> | <u>200%</u>            |
| <u>30-34</u>        | <u>190%</u>            |
| <u>35-39</u>        | <u>170%</u>            |
| <u>40-44</u>        | <u>150%</u>            |

|                    |             |
|--------------------|-------------|
| <u>45-49</u>       | <u>130%</u> |
| <u>50-54</u>       | <u>110%</u> |
| <u>55-59</u>       | <u>90%</u>  |
| <u>60</u>          | <u>70%</u>  |
| <u>61</u>          | <u>66%</u>  |
| <u>62</u>          | <u>62%</u>  |
| <u>63</u>          | <u>58%</u>  |
| <u>64</u>          | <u>54%</u>  |
| <u>65</u>          | <u>50%</u>  |
| <u>66</u>          | <u>48%</u>  |
| <u>67</u>          | <u>46%</u>  |
| <u>68</u>          | <u>44%</u>  |
| <u>69</u>          | <u>42%</u>  |
| <u>70</u>          | <u>40%</u>  |
| <u>71</u>          | <u>38%</u>  |
| <u>72</u>          | <u>36%</u>  |
| <u>73</u>          | <u>34%</u>  |
| <u>74</u>          | <u>32%</u>  |
| <u>75</u>          | <u>30%</u>  |
| <u>76</u>          | <u>28%</u>  |
| <u>77</u>          | <u>26%</u>  |
| <u>78</u>          | <u>24%</u>  |
| <u>79</u>          | <u>22%</u>  |
| <u>80</u>          | <u>20%</u>  |
| <u>81</u>          | <u>19%</u>  |
| <u>82</u>          | <u>18%</u>  |
| <u>83</u>          | <u>17%</u>  |
| <u>84</u>          | <u>16%</u>  |
| <u>85</u>          | <u>15%</u>  |
| <u>86</u>          | <u>14%</u>  |
| <u>87</u>          | <u>13%</u>  |
| <u>88</u>          | <u>12%</u>  |
| <u>89</u>          | <u>11%</u>  |
| <u>90 and over</u> | <u>10%</u>  |

(2) On or before the effective date of a substantial premium increase as defined in Paragraph (1) above, the insurer shall:

(a) Offer to reduce policy benefits provided by the current coverage without the requirement of additional underwriting so that required premium payments are not increased;

(b) Offer to convert the coverage to a paid-up status with a shortened benefit period in accordance with the terms of Subsection E. This option may be elected at any time during the 120-day period referenced in Subsection D(1); and

(c) Notify the policyholder or certificateholder that a default or lapse at any time during the 120-day period referenced in Subsection D(1) shall be

deemed to be the election of the offer to convert in Subparagraph (b) above.

(3) The contingent benefit upon lapse shall begin not later than the end of the third year following the policy or certificate issue date.

#### Section ~~24~~27. Permitted Compensation Arrangements

A. An insurer or other entity may provide commission or other compensation to an agent or other representative for the sale of a long-term care insurance policy or certificate which shall not exceed ~~twenty~~thirty-five percent (~~35~~25%) of the total premium paid for that policy year.

B. No entity shall provide compensation to its agents or other producers and no agent or producer shall receive compensation greater than twenty-five percent (25%) of the total premium paid for that policy year for the sale of a replacement long-term care insurance policy or certificate.

C. For purposes of this section, "compensation" includes pecuniary or non-pecuniary remuneration or any kind relating to the sale or renewal of the policy or certificate including but not limited to bonuses, gifts, prizes, awards and finders fees.

#### Section ~~25~~28. Penalties

In addition to any other penalties provided by the laws of this state, any insurer and any agent found to violate any requirement of this state relating to the regulation of long-term care insurance or the marketing of such insurance shall be subject to a fine of up to three (3) times the amount of any commissions paid for each policy involved in the violation or up to \$10,000, whichever is greater.

#### Section ~~26~~29. Separability

If any provision of this regulation or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the regulation and the application of such provision to other persons or circumstances shall not be affected thereby.

#### Section ~~27~~30. Effective Date

This regulation became effective July 30, 1990, except Section 13 became effective July 1, 1993. Amendment #1 adopted nonforfeiture benefits (Section~23) on December 23, 1996, to become effective on May 1, 1997. Subsequent amended provisions of this Regulation shall become effective 120 days from the Commissioner's order amending this regulation.

Donna Lee H. Williams  
Insurance Commissioner

Appendix B  
Long Term Care Insurance  
Personal Worksheet

People buy long-term care insurance for a variety of reasons. These reasons include to avoid spending assets for long-term care, to make sure there are choices regarding the type of care received, to protect family members from having to pay for care, or to decrease the chances of going on Medicaid. However, long term care insurance can be expensive, and is not appropriate for everyone. State law requires the insurance company to ask you to complete this worksheet to help you and the insurance company determine whether you should buy this policy.

Premium

The premium for the coverage you are considering will be [\$ \_\_\_\_\_ per month, or \$ \_\_\_\_\_ per year.] [a one-time single premium of \$ \_\_\_\_\_.]

[The company cannot raise your rates on this policy.] [The company has a right to increase premiums in the future.] The company has sold long-term care insurance since [year] and has sold this policy since [year]. [The last rate increase for this policy in this state was in [year], when premiums went up by an average of \_\_\_\_\_%]. [The company has not raised its rates for this policy.]

Drafting Note: The issuer shall use the bracketed sentence or sentences applicable to the product offered. If a company includes a statement regarding not having raised rates, it must disclose the company's rate increases under prior policies providing essentially similar coverage.

[ Have you considered whether you could afford to keep this policy if the premiums were raised, for example, by 20%?]

Drafting Note: The issuer shall use the bracketed sentence unless the policy is fully paid up or is a noncancellable policy.

Income

Where will you get the money to pay each year's premiums?

IncomeSavingsFamily members

What is your annual income? (check one)

Under \$10,000\$[10-20,000]\$[20-30,000]  
\$[30-50,000]Over \$50,000

**Drafting Note:** The issuer may choose the numbers to put in the brackets to fit its suitability standards.

How do you expect your income to change over the next 10 years? (check one)

No changeIncreaseDecrease

If you will be paying premiums with money received only from your own income, a rule of thumb is that you may not be able to afford this policy if the premiums will be more than 7% of your income.

Savings and Investments

Not counting your home, what is the approximate value of all of your assets (savings and investments)? (check one)

Under \$20,000\$20,000-\$30,000\$30,000-\$50,000  
Over \$50,000

How do you expect your assets to change over the next ten years? (check one)

Stay about the sameIncrease Decrease

If you are buying this policy to protect your assets and your assets are less than \$30,000, you may wish to consider other options for financing your long-term care.

Disclosure Statement

The information provided above accurately describes my financial situation.

I choose not to complete this information.

Signed:

(Applicant)(Date)

[ I explained to the applicant the importance of completing this information.

Signed:

(Agent)(Date)

Agent's Printed Name:]

[**Note:** In order for us to process your application, please return this signed statement to [name of company], along with your application.]

[My agent has advised me that this policy does not appear to be suitable for me. However, I still want the company to consider my application.]

Signed:     ] ]  
(Applicant)(Date)

Drafting Note: Choose the appropriate sentences depending on whether this is a direct mail or agent sale.

The company may contact you to verify your answers.

Drafting Note: When the Long-Term Care Insurance Personal Worksheet is furnished to employees and their spouses under employer group policies, the text from the heading "Disclosure Statement" to the end of the page may be removed.

### Appendix C

#### Things You Should Know Before You Buy Long-Term Care Insurance

- Long-Term Care Insurance
- A long-term care insurance policy may pay most of the costs for your care in a nursing home. Many policies also pay for care at home or other community settings. Since policies can vary in coverage, you should read this policy and make sure you understand what it covers before you buy it.
  - [You should **not** buy this insurance policy unless you can afford to pay the premiums every year.] [Remember that the company can increase premiums in the future.]

Drafting Note: For single premium policies, delete this bullet; for noncancellable policies, delete the second sentence only.

- Medicare
- The personal worksheet includes questions designed to help you and the company determine whether this policy is suitable for your needs.
  - Medicare does **not** pay for most long-term care.
- Medicaid
- Medicaid will generally pay for long-term care if you have very little income and few assets. You probably should **not** buy this policy if you are now eligible for Medicaid.
  - Many people become eligible for Medicaid after they have used up their own financial resources by paying for long-term care services.
  - When Medicaid pays your spouse's nursing home bills, you are allowed to keep your house and furniture, a living allowance, and some of your joint assets.
  - Your choice of long-term care services may be limited if you are receiving Medicaid. To learn more about Medicaid, contact your local or state Medicaid agency.

#### Shopper's Guide

- Make sure the insurance company or agent gives you a copy of a book called the National Association of Insurance Commissioners' "Shopper's Guide to Long-Term Care Insurance." Read it carefully. If you have decided to apply for long-term care insurance, you have the right to return the policy within 30 days and get back any premium you have paid if you are dissatisfied for any reason or choose not to purchase the policy.

#### Counseling

- Free counseling and additional information about long-term care insurance are available through your state's insurance counseling program. Contact your state insurance department or department on aging for more information about the senior health insurance counseling program in your state.

### Appendix D

#### Long-Term Care Insurance Suitability Letter

Dear [Applicant]:

Your recent application for long-term care insurance included a "personal worksheet," which asked questions about your finances and your reasons for buying long-term care insurance. For your protection, state law requires us to consider this information when we review your application, to avoid selling a policy to those who may not need coverage.

[Your answers indicate that long-term care insurance may not meet your financial needs. We suggest that you review the information provided along with your application, including the booklet "Shopper's Guide to Long-Term Care Insurance" and the page titled "Things You Should Know Before Buying Long-Term Care Insurance." Your state insurance department also has information about long-term care insurance and may be able to refer you to a counselor free of charge who can help you decide whether to buy this policy.]

[You chose not to provide any financial information for us to review.]

Drafting Note: Choose the paragraph that applies.

We have suspended our final review of your application. If, after careful consideration, you still believe this policy is what you want, check the appropriate box below and return this letter to us within the next 60 days. We will then continue reviewing your application and issue a policy if you meet our medical standards.

If we do not hear from you within the next 60 days, we will close your file and not issue you a policy. You should understand that you will not have any coverage until we hear back from you, approve your application and issue you a policy.

*Please check one box and return in the enclosed envelope.*

Yes, [although my worksheet indicates that long-term care insurance may not be a suitable purchase.] I wish to purchase this coverage. Please resume review of my application.

Drafting Note: Delete the phrase in brackets if the applicant did not answer the questions about income.

No. I have decided not to buy a policy at this time.

APPLICANT'S SIGNATURE DATE

*Please return to [issuer] at [address] by [date].*

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**DEPARTMENT OF NATURAL  
RESOURCES AND  
ENVIRONMENTAL CONTROL**

Statutory Authority: 7 Delaware Code,  
Chapter 70 (7 Del.C. Chp. 70)

**ORDER**

WHEREAS, pursuant to 7 Del. C. § 7005, the State Coastal Zone Industrial Control Board (the "Board") proposed to adopt Coastal Zone regulations as more specifically set forth in the Hearing Notices which are attached hereto as Exhibits "A" and "B" and incorporated herein; and,

WHEREAS, pursuant to 29 Del. C. § 10115, notice was given to the public that a hearing would be held on November 23, 1998, at 1:00 p.m. in Dover, Delaware and January 12, 1999, at 2:00 p.m. in Dover, Delaware to consider the proposed regulations and,

WHEREAS, the notice of the November 23, 1998 hearing invited the public to submit comments orally or in writing regarding the proposed amendments; and,

WHEREAS, two hearings were held on November 23, 1998, and January 12, 1999, and at each time a quorum of the Board was present; and,

SUMMARY OF EVIDENCE

WHEREAS, the Board heard oral comments at the hearing of November 23, 1998, from those individuals listed in Exhibit "C" hereto. The oral comments and Board responses are summarized as follows: Former DNREC Secretary Christophe A.G. Tulou spoke in the capacity of a private citizen regarding his impressions and observations of the proposed regulations. According to Mr. Toulou, the

Governor set forth to the Coastal Zone Regulatory Advisory Committee two overriding goals. Those goals were to develop a set of regulations that would ensure the continuing improvement of the environment in the Coastal Zone and to provide the flexibility for industry that is necessary to accomplish the first objective. Mr. Tulou believes the proposed regulations accomplish both those goals. The Coastal Zone Advisory Committee was comprised of 20 people appointed by the Governor who are involved in the Coastal Zone issues. In addition, any members of the public having an interest were invited to become involved in the process. The regulations as proposed are the product of a consensus of this Committee, not a majority vote, and therefore have the endorsement of all the groups and individuals represented through the Advisory Committee process. Mr. Tulou believes the proposed regulations are a very fragile agreement involving a tremendous amount of work and have dealt reasonably well with issues which have been extraordinarily hard to resolve. The product is a "bright-line test". Any activity that is going to have a negative impact on the Coastal Zone will require a permit. The application for such will detail, with certification, the impact on the Coastal Zone. Any negative impact on the Coastal Zone will have to be offset by some activity designed to ensure that the net result on the Coastal Zone environment will be better as a result. Some suggested offsets include eliminating harmful air emissions, or the restoration of wetlands. Mr. Tulou believes there to be flexibility to the offset portion of the regulations and states that an Environmental Indicators Technical Advisory Committee "EITAC" is being developed to provide specific Coastal Zone goals and indicators. The EITAC was formed pursuant to a Memorandum of Understanding put together by the Coastal Zone Advisory Committee. EITAC would provide yardsticks by which the future Secretary can determine if future proposals for offsets are appropriate. The information will also be available to the applicant so he or she may determine if their proposal is likely to be deemed appropriate.

Mary McKenzie, Acting Secretary of DNREC, recommended the Board accept the regulations as proposed and stressed that no changes should be made as the regulations are extremely complex and the agreement is fragile. She suggested that the Board adopt the regulations and allow them to demonstrate their effectiveness or problems over some time before amendments are considered.

Mark F. Dunkle spoke on behalf of the Delaware Solid Waste Authority (DSWA). His comments reflect those that he made at the August 26, 1998, workshop. Mr. Dunkle reiterated the DSWA's objection to the proposed Regulation Section C : Definition (11) regarding "Public Recycling Plants". The definition includes "any recycling plant or industrial facility whose primary product is recycled

materials and which is owned and operated by any city, town, county, district or other political subdivision". Mr. Dunkle believes this definition conflicts with the Authority's more recent and generic enabling act therefore inhibiting the ability of DSWA to contract out. Mr. Dunkle further asserted that the DSWA is a public body or instrumentality; however this was not mentioned in the definition of public recycling plant, despite a previous draft of such including such mention.

Mr. Dunkle questioned the definition of public sewage treatment plant in Section C: Definitions (12) as it is treated differently from that of public recycling plant in (11) and suggested the use of the language "under the jurisdiction", found in (12), also be applied to the definition of public recycling plant. In response to a question by the Board, Mr. Dunkle stated that he believes the DSWA constitutes an "existing use" at the time the Coastal Zone Act was adopted by way of the Act's inclusion of public recycling facilities. The DSWA undertook responsibilities for public recycling facilities and accordingly he believes it constitutes an existing use.

The Board disagrees, based on the evidence presented. The Board does not believe the DSWA was in existence and in active use on June 28, 1971 and therefore is required to have a permit. The Board does not agree that the definition of public recycling plant needs to be as expansive as that of public sewage treatment plant in order to conform with the Act. The Act does not define either public sewage treatment plant or public recycling plant and the Board is free to define these terms through the Regulations pursuant to the Coastal Zone Act at 7 *Del.C* § 7005(c).

Tom Mullin, a representative of the United Steel Workers of America and an employee at ICI Americas, advised the Board that ICI will be using its original footprint, not the one re-submitted in the summer. He also stressed that the regulations must strike a balance. Mr. Mullin urged to Board accept the proposed regulations without amendment and commented that there was opportunity for public comment at every meeting of the Advisory Committee.

Wendy Meyers, on behalf of the Eastern Environmental Law Center, offered comment questioning whether the regulations should address electrical utilities. She believes the regulation of such should be reviewed and that the regulations should address the construction of parking lots. She stated parking lots are presently exempt under Section E (4) and she believes they should be subject to the permitting requirements. Lastly, she suggested that the offsets be carefully planned and have a direct correlation to the health of the coastal zone with industry being required to prove such correlation with reasonable scientific certainty. Ms. Meyers agreed these issues could wait to be addressed by the Board at a later date through amendment.

The Board did not agree with Ms. Meyers that the

construction of a parking lot in itself should constitute expansion or extension of heavy industry or manufacturing uses under the regulations. The Board does not agree that the construction of parking lots presently requires inclusion in the regulations to protect the coastal zone from industrial development. The Board, likewise, did not agree that sufficient evidence was presented to the Board to require the inclusion of electrical utilities within the present proposed regulations. The Board agrees that proposed offsets should be carefully planned and correlate to the health of the coastal zone. Allan Muller, a representative of Green Delaware, commented regarding the composition of the Advisory Committee, suggesting there should have been representatives of watermen, fishermen, and recreational tourism industries. It is his belief that the chemical industry dominated the committee and residents of the coastal zone were not specifically contacted. He also stated that no member of the Committee or the Board is a minority.

Mr. Muller questioned the amount of discretion left with DNREC under the proposed regulations and the offsetting process. Mr. Muller believes the regulations are fundamentally unsound in their reliance on the offset process, indicator process, and the exclusion of electrical facilities from heavy industry.

The Board disagrees with Mr. Muller that the composition of the Advisory Committee or the Board is discriminatory. The Board further disagrees with Mr. Muller that the regulations give DNREC more discretion than it is capable of properly exercising. The Board's opinion regarding Mr. Muller's remaining comments have previously been addressed herein.

Jim Lisa, a representative of the Delaware Economic Development Office, advised that the Office of Tourism is housed within the Delaware Economic Development Office and the Director of Tourism was informed of all meetings, invited to attend and was provided all information regarding the regulations by the Advisory Committee. The Delaware Economic Development Office is in full support of the regulations as proposed and recommends their adoption without modification.

The remainder of the public comments are summarized as follows: the consensus process was lengthy and thorough enough that no hidden agendas or surprise areas appear to remain. The regulations meet the major objectives of all parties. They are a delicately balanced compromise agreement and are extremely fragile. The regulations should be adopted as proposed.

WHEREAS, the Board received several written comments, documents and other submissions regarding the hearing of November 23, 1998. These are described in more detail below and were made part of the record identified as Exhibits "D-H" and incorporated herein; Exhibit "D": November 19, 1998, letter from Mark F. Dunkle, Esq.

supporting his oral comments made on November 23, 1998, at the public hearing. Mr. Dunkle's comments have been addressed by the Board previously and will not be restated.

Exhibit "E": November 23, 1998, Statement from the League of Women Voters of Delaware by Jackie Harris, President. Ms. Harris urges that the Board promptly adopt the regulations as transmitted by DNREC based on the lengthy consensus process, which was monitored by League members.

Exhibit "F": November 23, 1998, letter from Robert W. Whetzel, Esq. from Richards, Layton & Finger, P.A., a law firm. Mr. Whetzel asserts the offset provisions of the proposed regulations are beyond the statutory authority granted by the Coastal Zone Act (CZA). Mr. Whetzel argues the CZA identifies factors for the Secretary to consider in reviewing a permit application under 7 *Del.C.* § 7004(b), however it does not require a permit applicant to more than offset the environmental impacts of a proposed project. Mr. Whetzel further objects to the failure of the proposed regulations to define the terms "negative environmental impact" or "offset proposal". Additionally, he felt that there is no basis to measure the impact. Lastly, Mr. Whetzel objects to Section G (1) regarding status decisions. He believes the proposed regulations are unclear in regards to the request for a status decision whether or not an activity or facility is a "heavy industry". He suggests the Board replace the language with "requires a Coastal Zone permit".

The Board disagrees with Mr. Whetzel. The Board believes Section I of the proposed regulations regarding Offset Proposal Requirements is not contrary to law as the Coastal Zone Act 7 *Del.C.* § 7004 (b) sets forth in detail the factors which shall be considered in passing on permit requests. Among those listed are environmental impact, economic effect, aesthetic effect, and effect on neighboring land uses. The statute does not distinguish among such "impacts" or "effects"; nor does the statute prohibit mitigation of such effects. Moreover, the Act mandates the development of comprehensive regulations and gives the Board broad discretion in regard to those regulations.

The Board does not believe that further definition regarding this Section is presently necessary. The determination of negative environmental impacts and the measuring of offsets can be resolved through the administrative actions of the Secretary in conjunction with the goals and indicators provided by EITAC. If problems arise, an appeal may still be made to the Board. The Board also disagrees that Section G (1) regarding status decisions is unclear. The request for a status decision as to whether or not an activity or facility is a "heavy industry" will adequately advise the inquirer as to how its intended activity or facility will be handled under the Coastal Zone Act and its regulations.

Exhibit "G": November 23, 1998, Comment from Wolfgang von Baumgart. Mr. Baumgart suggested the

inclusion of radioactive agents, high-level radioisotopes, Plutonium, and Actinides, Lanthanides to Section D regarding prohibited uses. He further suggested the Secretary and Board have the power to prohibit or limit some proposed activities regarding those items previously mentioned.

The Board does not agree that Section D need be expanded at this point to include those agents suggested by Mr. Baumgart. The Board has been presented with insufficient evidence to suggest these agents are presently a threat to the Coastal Zone or are being contemplated as agents to be used within the Coastal Zone at this time.

Mr. Baumgart suggested amendments to Section E regarding Uses Not Regulated. The Board sees no present need to change the proposed language regarding this Section to conform to his suggestions and has been presented with no other evidence in support of such.

Mr. Baumgart suggested amendments to Section H.2 Environmental Impact Statement under Permitting Procedures. The Board does not agree that the proposed amendments are presently necessary to adequately fulfill the Permitting Procedures. The Board believes the environmental impact statement requirements are presently sufficient and has been presented no other evidence to support the inclusion of these amendments to the statement. The Board referred Mr. Baumgart's comments to the Secretary of DNREC for his or her administrative guidance. Exhibit "H": November 23, 1998, Statement from Richard A. Fleming, Private Citizen. Mr. Fleming requested the Board adopt the proposed regulations without amendment.

WHEREAS, the Board received oral comments at the hearing of January 12, 1999, from those individuals listed in Exhibit "I" as attached. The oral comments are summarized as follows:

Ms. Betty Piovoso, a technologist in the Environmental Department at the Delaware City Refinery owned and operated by Motiva Enterprises, offered three comments. First Appendix B showing the Footprints of Nonconforming Uses should be changed to read "Motiva Enterprise" instead of "Star Enterprise" in light of their recent change in ownership. Second, she suggested the workload surrounding the new permitting process may be too burdensome for DNREC. Third, Motiva does not believe the Coastal Zone Act requires a net environmental improvement but simply a mitigation of impact through the offsetting process. Notwithstanding that observation, Motiva believes the Secretary should develop specific guidance for the regulated community to use in determining the magnitude and adequacy of offset proposals. Ms. Piovoso agreed any immediate harm could be eliminated through the Secretary's administrative decisions.

The Board does not agree that the footprints presently in the regulations must be changed for their adoption. The footprints are presently sufficient for adoption of the

regulations. The footprints will change periodically for various reasons, such as changes in ownership, and these changes can be resolved through future amendment.

The Board does not agree that the DNREC will be overburdened by the adoption of the regulations as proposed and has confidence that a new Secretary will adequately address any administrative needs and changes to accommodate the implementation of these regulations; if not, an appeal may be made to the Board. The Board likewise disagrees that any net environmental improvement resulting from the offsetting process would be contrary to the Coastal Zone Act. The Board expects the Secretary to issue guidance on offsets in the future. Mr. Bruce Patrick, a Kent County engineer, commented regarding public sewer treatment plants (POTWs). Mr. Patrick is concerned that POTWs are already very heavily regulated. Mr. Patrick questioned the definition in Section C (12) of Public Sewer Treatment Plants and suggested deleting the word "conveyance" from the definition. By including the word "conveyance", he is concerned that it will be more difficult to conduct septic elimination projects in the Coastal Zone. The logistics will slow the process for many of the townships fixing failing septic systems. Mr. Patrick's second comment questioned the effect the definition will have on the existing POTWs. Mr. Patrick suggests the regulations may slow the ability of POTWs to make modifications to address failing septic systems. Mr. Patrick suggested either eliminating POTWs from the Coastal Zone regulations and instead focusing on industrial wastewater treatment facilities, or eliminating the term "conveyance".

Mr. Michael Izzo, the County Engineer for Sussex County, echoed Mr. Patrick's concerns. He specifically addressed the cost associated with the application process as troubling and informed the Board that the Sussex County Council opposes the inclusion of any reference to wastewater facilities of any kind in the proposed regulations.

The Board does not agree at this time with Mr. Patrick's suggested change to Section C (12) defining Public Sewer Treatment Plants. The concerns addressed to the Board by both gentlemen regarding POTWs are speculative. While the Board is concerned that sewer systems have problems, especially in Kent and Sussex Counties, the Board hopes the Secretary of DNREC will make every effort to implement administrative policies to protect against excessive delay or unreasonable cost. If not, an appeal may be made to the Board. The comments regarding the regulation of POTWs have not been supported by sufficient evidence at present to convince the Board that the proposed regulations will result in an adverse impact to the Coastal Zone. The Pfisteria problem is being concurrently studied. The inconvenience or additional cost of regulation is not a justifiable reason to exempt an activity or facility from the Coastal Zone Act and its permitting requirements, especially if administrative remedies are yet available.

The remaining public comments are summarized as follows: there have been several ownership changes of the involved industries and the footprints should be left as is. Any changes in footprints can be addressed through later amendment to the regulations. The Advisory Committee meetings were open to the public, however, representatives from the counties did not attend.

WHEREAS, prior to the close of the written comment period the Board received written comments from Oceanport Industries, Inc. and Motiva Enterprises, LLC. These comments were made part of the record, are attached as Exhibits "J" and "K" and incorporated herein. These comments are summarized as follows:

Exhibit "J": November 17, 1998 Letter from Robert H. MacPherson of Oceanport Industries, Inc. Mr. MacPherson questions the clarity of Section C (6) defining Docking Facility and offers some revised language. The Board disagrees that the language is ambiguous and does not adopt his suggested revision. Mr. MacPherson suggests modification to Section D E.9 to include "or as subsequently approved by Delaware Coastal zone permit". The Board disagrees that this language is necessary as the activity is already permitted and its inclusion is unnecessary. Mr. MacPherson further suggests an addition to E.12 to include mooring buoys, dolphins and other mooring devices serving only to safely secure vessels to an existing nonconforming bulk product transfer facility. The Board disagrees and believes the definition of "docking facility" adequately addresses this concern.

Mr. MacPherson expressed concern that Section D. numbers 3, 5, and 7 are sufficiently similar and should be condensed into one use or activity. The Board has determined the prohibited uses or activities as stated in numbers 3, 5, and 7 describe different uses or activities distinctly enough that their separation into different sections is appropriate and unambiguous. These were referred to the Secretary for his or her guidance.

Mr. MacPherson further suggests modification to Section F.1 and F.3 in accordance with his reading of the regulation. The Board disagrees that the suggested changes by Mr. MacPherson to Section F of Uses Requiring a Permit are necessary at this time. Mr. MacPherson has presented insufficient evidence in support of any of his suggested amendments or changes to the proposed regulations and the Board is not convinced by his written comments that these changes are presently necessary for the regulations to conform to the Coastal Zone Act.

Lastly, Mr. MacPherson suggests changing the footprint of Oceanport. Mr. MacPherson has provided little evidence that the footprint as proposed is inaccurate. The Board accepts the footprint as presented and to the extent change is later shown necessary, it can be accomplished through amendment.

Exhibit "K" November 23, 1998, letter from P.M. Laabs

of Motiva Enterprises, LLC. Mr. Laabs' comment addresses the facility's footprint and suggests it be changed in light of the change in ownership. Also, Mr. Laabs addresses the same concerns as Ms. Piovoso regarding the increased workload at DNREC in issuing permits and the concerns surrounding the offsetting process. The Board has previously responded to these concerns in addressing Ms Piovoso's comments and they will not be restated here.

#### FINDINGS OF FACT

WHEREAS, the Board makes the following factual findings:

1) The regulations as proposed are a fragile consensus of agreement between industry, and members of the public who have expressed an interest in the Coastal Zone and the Department of Natural Resources and Environmental Control. The regulations represent a delicate balance of each party's concerns and opinions on how to govern the disposition of permit requests and procedures for hearings before the Secretary of the Department of Natural Resources and Environmental Control ("DNREC") and the Board. The regulations as proposed serve as a comprehensive plan and guideline for the Board regarding acceptable types of manufacturing uses in the coastal zone and further elaborate the definition of "heavy industry" in a manner consistent with the purposes and provision of Chapter 7. The Act mandates that the Secretary of DNREC shall prepare such comprehensive regulations.

2) Many of the concerns addressed to the Board were previously addressed to the Advisory Committee and sub-committees. Having had the opportunity to engage in lengthy discussion and research, the Advisory Committee believes that the regulations as proposed appropriately address these concerns. Members of the Advisory Committee provided oral comments regarding some of these concerns. The Board is satisfied that the concerns were adequately addressed through the Advisory Committee process and were adequately taken into account in drafting the proposed regulations. The Board has not been presented with sufficient evidence to cause it to modify the suggested language of the regulations as proposed.

3) The Board is satisfied that the composition of the Advisory Committee and the Board is a fair representation of the citizens of the State of Delaware and the industries affected.

4) The concerns addressed to the Board through oral and written comment regarding POTWs and de minimis impact projects are adequately addressed by the regulations. The Board is confident that the Secretary of DNREC will attempt to exercise the appropriate discretion and implement appropriate administrative policies to further resolve any issues. If not, an appeal may be made to the Board. Although the possibility of additional costs and possible delays are of concern, they are only possible consequences

of the regulations as proposed and have not at this point been proven as having an adverse impact on the Coastal Zone. The comments also support that these issues can be further addressed through the administrative actions of the Secretary. None of the issues presented were supported by sufficient evidence to require amendment to the regulations as proposed at present. The Board believes the proposed regulations are sufficiently written to provide adequate notice and are enforceable.

5) The Board does not find any of the definitions to be vague or overly broad. In particular, the Board is satisfied that the definition of Public Recycling Plant at Paragraph 11 is reasonable and enforceable. The definition conforms to the mandates of the Coastal Zone Act and the objectives of Title 7 *Del.C.* Chapter 64.

6) The footprints presently in the regulations are sufficient for adoption of the regulations and any changes in ownership or otherwise can be resolved through future amendment without the necessity of present modification to the regulations as proposed.

7) Section I of the proposed regulations regarding Offset Proposal Requirements is not contrary to law as the Coastal Zone Act 7 *Del.C.* § 7004 (b) sets forth in detail the factors which shall be considered in passing on permit requests. Among those listed are environmental impact, economic effect, aesthetic effect, and effect on neighboring land uses. The statute does not distinguish among such "impacts" or "effects"; nor does the statute prohibit mitigation of such effects. Broad discretion was given to the Board under the Coastal Zone Act. The Board believes the administrative actions of the Secretary in conjunction with the goals and indicators provided by EITAC will address any issues regarding the measuring of offsets.

8) Any additional concerns presented to the Board not specifically addressed herein are deemed either not relevant to the Coastal Zone Regulations or the Board believes they can be fully addressed administratively and incorporated through amendment to the regulations following a more thorough review. The Board does not believe these concerns will result in any immediate adverse impact on the Coastal Zone nor are they contrary to law.

WHEREAS, the Board is satisfied that the regulations, as proposed, adequately set forth a comprehensive plan and guidelines for the Board concerning manufacturing uses acceptable in the coastal zone, and that they further elaborate the definition of "heavy industry" in a manner consistent with the purposes and provision of the Coastal Zone Act and that its rules and regulations are in compliance with the provision of 7 *Del.C.* Chapter 70 and 24 *Del. C.* Ch. 29;

NOW, THEREFORE, based on the Board's authority to adopt rules and regulations pursuant to 7 *Del. C.* § 7005, it is the decision of the Board to adopt the proposed regulations as presented to the Board. The regulations as proposed, a copy of which are attached hereto as Exhibit "L" and

incorporated herein, shall be effective 10 days from the date of this Order as published in the Register of Regulations pursuant to 29 *Del.C.* § 10118(e). The Board will forward a copy of the record to the Secretary of DNREC for consideration in implementing the regulations with specific and immediate reference to Section C 12 concerning Public Sewage Treatment Plants or POTWs and any resulting impact on county sewer systems.

IT IS SO ORDERED this day of , 1999.

STATE COASTAL ZONE INDUSTRIAL CONTROL BOARD

Christine M. Waisanen, Chairwoman  
George Collins  
R. Jefferson Reed  
David Ryan  
J. Paul Bell  
Victor Singer  
Darrell Minott  
Donald J. Verrico  
John Allen, Sr.

**Regulations Governing Delaware's Coastal Zone  
Prepared by  
The Delaware Department of Natural Resources and  
Environmental Control  
for  
The Coastal Zone Industrial Control Board  
May 11, 1999**

Table of Contents

**\*PLEASE NOTE THAT DUE TO SPACE CONSTRAINTS THE TABLE OF CONTENTS IS NOT BEING REPRINTED HERE. THE TABLE OF CONTENTS IS AVAILABLE FROM THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL OR THE REGISTRAR.**

Preamble

These regulations have been developed to accomplish two key goals. They have been designed to promote improvement of the environment within the Coastal Zone while also providing existing and new industries in Delaware's Coastal Zone with the flexibility necessary to stay competitive and to prosper – all while adhering to the edicts and nuances of one of the most original and innovative environmental and land use statutes in the world.

Delaware's Coastal Zone Act was passed in 1971 and provides to the Secretary of the Department of Natural Resources and Environmental Control and the Coastal Zone Industrial Control Board the authority to promulgate

regulations to carry out the requirements contained within the Act. For numerous reasons, regulations were never adopted and implementation of Coastal Zone Act was left to an undefined and informal process that frustrated industry and environmentalist alike. That frustration further polarized the debate over the original intention of the Act and what the focus of any regulations should be.

Finally, 25 years after passage of the Act, the negative implications of not having regulations came to outweigh the contentiousness of the debate. An advisory committee of dedicated Delawareans was then convened and, after eighteen months of oftentimes difficult debate, came to consensus agreement on how to embody the linked goals of industry flexibility and environmental improvement. The committee's agreements were memorialized in a Memorandum of Understanding between all participants. That MOU was founded on consensus, respect and necessity and it was used as a basis for these regulations.

A. Authority

1. These regulations are promulgated pursuant to authority granted to the Secretary and the State Coastal Zone Industrial Control Board by Section 7005(b) and (c) of the Coastal Zone Act, 7 Del. C., Chapter 70.

B. Applicability

1. The Coastal Zone Act program and these regulations are administered by the Delaware Department of Natural Resources and Environmental Control pursuant to 7 Del. C. Section 7005(a).

2. These regulations apply to areas within the Coastal Zone as defined by 7 Del. C. Chapter 70. A map of the coastal zone appears in Appendix A of these regulations.

3. These regulations specify the permitting requirements for existing non-confoming uses already in the coastal zone and for new manufacturing uses proposing to locate within Delaware's coastal zone.

C. Definitions

Many terms which appear in these regulations are defined in the Coastal Zone Act as shown in Appendix E. Terms not defined in the Act shall have the following meanings:

1. "Administratively Complete" means a coastal zone permit application or status decision request that is signed, dated, and contains, in the opinion of the Secretary, substantive responses to each question, a sufficient offset proposal, if applicable, and includes the appropriate application fee and all enclosures the applicant has referenced in the application.

2. "Board" means the State Coastal Zone Industrial Control Board.

3. "Bulk Product" means loose masses of cargo such as oil, grain, gas and minerals, which are typically stored in the hold of a vessel. Cargoes such as automobiles, machinery, bags of salt and palletized items that are

individually packaged or contained are not considered bulk products in the application of this definition.

4. "Certify" means the applicant is attesting, by affirmation, that all the data and other information in the application is true and accurate.

5. "Department" means the Delaware Department of Natural Resources and Environmental Control.

6. "Docking Facility" means any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

7. "Environmental indicator" means a numerical parameter which provides scientifically-based information on important environmental issues, conditions, trends, influencing factors and their significance regarding ecosystem health. Indicators inherently are measurable, quantifiable, meaningful and understandable. They are sensitive to meaningful differences and trends, collectible with reasonable cost and effort over long time periods, and provide early warning of environmental change. They are selected and used to monitor progress towards environmental goals.

8. "Footprint" means the geographical extent of non-conforming uses as they existed on June 28, 1971 as depicted in Appendix B.

9. "Port of Wilmington" means those lands contained with the footprint shown in Appendix B of these regulations.

10. "Potential To Pollute" means the proposed use has the potential to cause short and long term adverse impacts on human populations, air and water quality, wetlands, flora and fauna, or to produce dangerous or onerous levels of glare, heat, noise, vibration, radiation, electromagnetic interference and obnoxious odors as determined in the applicant's Environmental Impact Statement accompanying the permit application. The Department will consider mitigating controls and risk management analysis reports from the applicant in evaluating a proposed use's potential to pollute. The Department shall consider probability of equipment failure or human error, and the existence of backup controls if such failure or error does occur, in evaluating an applicant's potential to pollute.

11. "Public Recycling Plant" means any recycling plant or industrial facility whose primary product is recycled materials and which is owned and operated by any city, town, county, district or other political subdivision.

12. "Public Sewage Treatment Plant" means any device and/or system used in conveyance, storage, treatment, disposal, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature, which systems are under the jurisdiction of a city, town, county, district or other political subdivision.

13. "Recycle" means the series of activities, including collection, separation, and processing, by which products or other materials are recovered from or otherwise diverted from the solid waste stream for use in the form of raw materials other than fuel for producing heat or power combustion.

14. "Research And Development Activity" means those activities in which research and development substances are used in quantities that are not greater than reasonably necessary for the purposes of scientific experimentation or product or process development. The research and development substances must either be the focus of research and development itself, or be used in the research and development activity focusing on another chemical or product. research and development includes synthesis, analysis, experimentation or research on new or existing chemicals or products. Research and development encompasses a wide range of activities which may occur in a laboratory, pilot plants or commercial plant, for testing the physical, chemical, production, or performance characteristics of a substance, conducted under the supervision of a technically qualified individual. Research and development is distinct from ongoing commercial activities which focus on building a market for a product rather than just testing its market potential. General distribution of chemical substances or products to consumers does not constitute research and development.

15. "Secretary" means the Secretary of the Department of Natural Resources and Environmental Control.

16. "Vessel" means any ship, boat or other means of conveyance that can transport goods or materials on, over, or through water.

17. "Voluntary Improvements" means improvements, for example, in emissions reductions, habitat creation and spill prevention -- provided that each is definite and measurable and which were made by a facility without any federal or state requirement to do so.

#### D. Prohibited Uses

The following uses or activities are prohibited in the Coastal Zone:

1. Heavy industry use of any kind not in operation on June 28, 1971.

2. Expansion of any non-conforming uses beyond their footprint(s) as depicted in Appendix B of these regulations.

3. Offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28,

1971.

4. The conversion of an existing unregulated, exempted, or permitted facility to a heavy industry use.

5. Bulk product transfer facilities and pipelines which serve as bulk transfer facilities that were not in operation on June 28, 1971.

6. The conversion or use of existing unregulated, exempt, or permitted docking facilities for the transfer of bulk products.

7. The construction, establishment, or operation of offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971.

8. Individual pipelines or sets of pipelines which are not associated with a use that obtains a permit but which meet the definition of bulk product transfer facilities.

9. Any new tank farm greater than 5 acres in size not associated with a manufacturing use is prohibited as a new heavy industry use.

#### E. Uses Not Regulated

The construction and/or operation of the following types of facilities and/or activities shall be deemed not to constitute initiation, expansion or extension of heavy industry or manufacturing uses under these regulations:

1. The raising of agricultural commodities or livestock.

2. Warehouses or other storage facilities, not including tank farms.

3. Tank farms of less than five acres.

4. Parking lots or structures, health care and day care facilities, maintenance facilities, commercial establishments not involved in manufacturing, office buildings, recreational facilities and facilities related to the management of wildlife.

5. Facilities used in transmitting, distributing, transforming, switching, and otherwise transporting and converting electrical energy.

6. Facilities used to generate electric power directly from solar energy.

7. The repair and maintenance of existing electrical generating facilities providing such repair or maintenance does not result in any negative environmental impacts.

8. Back-up emergency and stand-by source of power generation to adequately accommodate emergency industry needs when outside supply fails.

9. The continued repair, maintenance and use of any non-conforming bulk product transfer facility where that facility transfers the same products and materials, regardless of the amount of such products or materials, as those transferred on June 28, 1971.

10. Bulk product transfer operations at dock facilities owned by the Diamond State Port Corp. (DSPC), or acquired by the DSPC at any time in the future, and which are located within the Port of Wilmington as shown in

Appendix B.

11. Docking facilities used as bulk product transfer facilities located on privately owned lands within the Port of Wilmington which have been granted a status decision extending the bulk product transfer exemption prior to the effective date of these regulations.

12. Docking facilities which are not used as bulk product transfer facilities.

13. Any pipeline that originates outside the Coastal Zone, traverses the Coastal Zone without connecting to a manufacturing or heavy industry use and terminates outside the Coastal Zone.

14. Maintenance and repair of existing equipment and structures.

15. Replacement in-kind of existing equipment or installation of in-line spares for existing equipment.

16. Installation and modification of pollution control and safety equipment for nonconforming uses within their designated footprint providing such installation and modification does not result in any negative environmental impact over and above impacts associated with the present use.

17. Any facilities which have received, prior to the promulgation of these regulations, a status decision which provided an exemption for the activity in question.

18. Research and development activities within existing research and development facilities.

19. Any other activity which the Secretary determines, through the status decision process outlined in Section G of these regulations, is not an expansion or extension of a non-conforming use or heavy industry use.

#### F. Uses Requiring a Permit

The following uses or activities are permissible in the Coastal Zone by permit. Permits must be obtained prior to any land disturbing or construction activity.

1. The construction of pipelines or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. To be permissible under these regulations, the materials transferred through the pipeline or docking facilities must be used as a raw material in the manufacture of other products, or must be finished products being transported for delivery.

2. Any public sewage treatment plant or public recycling plant.

3. Any new activity, with the exception of those listed in Section E of these regulations proposed to be initiated after promulgation of these regulations by an existing heavy industry or a new or existing manufacturing facility that may result in any negative impact on the following factors as found in 7 Del. C., Section 7004 (b):

a) Environmental impact, including but not limited to, items H.2.a through H.2.j of these regulations.

b) Economic effect, including the number of

jobs created and the income which will be generated by the wages and salaries of these jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to state and local government.

c) Aesthetic effect, such as impact on scenic beauty of the surrounding area.

d) Number and type of supporting facilities required and the impact of such facilities on all factors listed in this subsection.

e) Effect on neighboring land uses including, but not limited to, effect on public access to tidal waters, effect on recreational areas and effect on adjacent residential and agricultural areas.

f) County and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction.

#### G. Requests For Status Decisions

1. Any person wishing to initiate a new activity or facility may request a status decision to determine whether or not the activity or facility is a heavy industry.

2. A person whose proposed activity is not exempted as specified in Section E above may request of the Secretary a status decision to determine whether or not the proposed activity requires a Coastal Zone permit under the Act or these regulations.

3. Status decision requests must be in writing on a form supplied by the Secretary and shall include, at a minimum, the following:

a) Name, address and contact person for the activity or facility under consideration.

b) Site of proposed activity marked on a map or site plan.

c) A detailed description of the proposed activity under consideration.

d) An impact analysis of the proposed project on the six (6) criteria contained in Section F.3 (a-f) above.

4. Any new manufacturing facility or research and development facility proposed to be sited in the Coastal Zone shall apply for a status decision.

5. The Secretary may, if he has cause to suspect an activity within the confines of the Coastal Zone is prohibited or should receive a permit under these regulations, request of the person undertaking that activity to apply for a status decision as described in this section. Failure of the person to respond to the Secretary's request shall subject said person to enforcement procedures as contained in the Act and/or Section R of these regulations.

6. Upon receipt of an administratively complete request for a status decision, the Secretary shall publish a legal notice as prescribed in Section N of these regulations advising the public of the receipt of the request and allowing 10 business days for interested persons to review the request and provide the Secretary with input on whether a permit should be required of the applicant.

7. The Secretary shall then, within an additional 15 business days, determine whether or not a permit will be required and notify the applicant in writing of his determination. The Secretary shall publish that determination as a legal notice as prescribed in Section N of these regulations.

#### H. Permitting Procedures

##### Application Contents

The applicant shall complete and submit to the Secretary three (3) identical copies of the Coastal Zone permit application. The application will be on a form supplied by the Secretary and will contain, at a minimum:

a) A certification by the applicant that the information contained with the application is complete, accurate and truthful.

b) Evidence of local zoning approval as required by section 7004 (a) of the Act.

c) An Environmental Permit Application Background Statement as required under 7 Del. C. Chapter 79, if applicable.

d) An Environmental Impact Statement as described in Section H.2 of these regulations.

e) A description of the economic effects of the proposed project, including the number of jobs created and the income which will be generated by the wages and salaries of these jobs and the amount of tax revenues potentially accruing to State and local government.

f) A description of the aesthetic effects of the proposed project, such as impact on scenic beauty of the surrounding area.

g) A description of the number and type of supporting facilities required and the impact of such facilities on all factors listed in this section.

h) A description of the effect on neighboring land uses including, but not limited to, effect on public access to tidal waters, effect on recreational areas and effect on adjacent residential and agricultural areas.

i) A statement concerning the project or activity's consistency with county and municipal comprehensive plans.

j) An offset proposal if required under Section I.1.a of these regulations.

##### H.2 Environmental Impact Statement

An environmental impact statement must be submitted with the Coastal Zone permit application and must contain, at a minimum, an analysis of the following:

a) Probable air, land and water pollution likely to be generated by the proposed use under normal operating conditions as well as during mechanical malfunction and human error. In addition, the applicant shall provide a statement concerning whether, in the applicant's opinion, the project or activity will in any way result in any negative environmental impact on the Coastal Zone.

b) An assessment of the project's likely impact on

the Coastal Zone environmental goals and indicators, when available. Coastal Zone environmental goals and indicators shall be developed by the Department after promulgation of these regulations and used for assessing applications and determining the long-term environmental quality of the Coastal Zone. In the absence of goals and indicators, applicants must meet all other requirements of this section.

c) Likely destruction of wetlands and flora and fauna.

d) Impact of site preparation on drainage of the area in question, especially as it relates to flood control;

e) Impact of site preparation and facility operations on land erosion;

f) Effect of site preparation and facility operation on the quality and quantity of surface and ground water resources,

g) A description of the need for the use of water for processing, cooling, effluent removal, and other purposes;

h) The likelihood of generation of glare, heat, noise, vibration, radiation, electromagnetic interference and/or obnoxious odors,.

i) The effect of the proposed project on threatened or endangered species as defined by the regulations promulgated by the State or pursuant to the Federal Endangered Species Act, and,

j) The raw materials, intermediate products, byproducts and final products and their characteristics from material safety data sheets (MSDS's) if available, including carcinogenicity, mutagenicity and/or the potential to contribute to the formation of smog.

### H.3 Application Review Process

a) The Department reserves the right to request further relevant information after receipt of an application and prior to the application being deemed administratively complete. The Secretary shall notify the applicant by certified mail when the application is deemed administratively complete.

b) In assessing an application, the Secretary shall consider how the proposed project will affect the six criteria cited in the Act, including direct and cumulative environmental impacts, economic effects, aesthetic effects, number and type of supporting facilities and their anticipated impacts on these criteria, effect on neighboring land uses, and compatibility with county and municipal comprehensive plans.

c) The Secretary shall also consider any impacts the proposed activity may have on the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone.

d) Prior to public hearing, the Secretary shall provide a written assessment of the project's likely impact on the six criteria listed in Section H.1 above and make

available the preliminary determination of the sufficiency of the offset project as required in Section I of these regulations. The Secretary's report will be provided to the applicant and interested citizens prior to the public hearing and made a part of the record.

e) Upon receipt of an administratively complete application and completion of the Secretary's assessment as required in Section H.3.d above, the Secretary shall issue a public notice as prescribed in Section N of these regulations and hold a public hearing in accordance with hearing procedures described in Section O of these regulations.

f) Within 90 days of receipt of an administratively complete application, not counting the day the application became administratively complete, the Secretary shall reply to the request for a Coastal Zone act permit either granting the permit, denying the permit or granting the permit but with special conditions. The Secretary shall state the reasons for his decision.

g) The permit decision shall be sent to the applicant by certified mail and shall be noticed as prescribed in Section N of these regulations. If no appeal is received within the 14-day appeal period following the date of publication of the legal notice, the decision becomes final and no appeal will be accepted.

#### I. Offset proposals

##### Offset Proposal Requirements

a) Any application for a Coastal Zone permit for an activity or facility that will result in any negative environmental impact shall contain an offset proposal. Offset proposals must more than offset the negative environmental impacts associated with the proposed project or activity requiring a permit. It is the responsibility of the applicant to choose an offset project that is clearly and demonstrably more beneficial to the environment in the Coastal Zone than the harm done by the negative environmental impacts associated with the permitting activities themselves.

b) All applicants, are required to more than offset the negative impacts of the project or activity that is the subject of the application for a Coastal Zone permit. Applicants who have undertaken past voluntary improvements may be required to provide less of an offset than applicants without a similar record of past achievements.

c) The Secretary shall give preference to offset projects that are within the Coastal Zone, that occur in the same environmental medium as the source of degradation of the environment, that occur at the same site as the proposed activity requiring a permit and that occur simultaneously with the implementation of the proposed activity needing an offset.

d) Offset proposals should be well-defined and contain measurable goals or accomplishments which can be audited by the Department.

e) Within 30 days of receipt of an application, the Secretary shall make a preliminary determination as to whether the proposed offset commitment is sufficient. If the offset commitment is deemed not to be sufficient, the applicant will be informed that his application is not administratively complete and the Secretary shall request another offset proposal.

f) Where an offset project in itself requires one or more permits from a program or programs within DNREC, the Secretary shall issue the Coastal Zone Permit only after all applicable permit applications for offsetting projects have been received and deemed administratively complete by DNREC.

#### I.2 Offset Proposal Contents

The applicant may provide whatever materials or evidence deemed appropriate in order to furnish the Secretary with the information necessary for him to determine the adequacy of the offset proposal. The applicant must provide, at a minimum, the following information:

a) A qualitative and quantitative description of how the offset project will more than offset the negative impacts from the proposed project as provided by the applicant pursuant to Section H.2.a of these regulations.

b) How the offset project will be carried out and in what period of time.

c) What the environmental benefits will be and when they will be achieved.

d) How the offset will impact the attainment of the Department's environmental goals for the Coastal Zone and the environmental indicators used to assess long-term environmental quality within the zone.

e) What, if any, negative impacts are associated with the offset project.

f) What scientific evidence there is concerning the efficacy of the offset project in producing its intended results.

g) How the success or failure of the offset project will be measured in the short and long term.

#### I.3 Enforcement Of Offset Proposals

a) Coastal Zone permits shall be approved contingent upon the applicant carrying out the proposed offset in accordance with an agreed upon schedule for completion of the offset project. Said schedule will be included in the Coastal Zone permit as an enforceable condition of the permit.

b) Should a Coastal Zone permit applicant fail to receive, within 180 days of issuance of the Coastal Zone permit, any and all permits required to undertake an offset project, the applicant, except for good cause shown by the applicant for additional time, will be required to submit an entirely new application for the activity, including all submissions listed in Section H above, additional permit fees and a new proposed offset project.

#### J. Withdrawal Of and Revisions To Applications

1. An applicant may withdraw his request for a status decision or Coastal Zone permit at any time by submitting a written request, signed by the original applicant, to the Secretary. The Secretary shall provide public notice of the applicant's withdrawal request and the Secretary's action on the request for withdrawal. In the case of such withdrawal there shall be no refund of the application fee paid. Once publicly noticed, the decision is final and cannot be reversed by the applicant or the Secretary.

2. Once public notice announcing a public hearing is advertised according to Section N of these regulations, no revisions to any application will be permitted beyond those allowed in Section J.3 below. In the event an applicant finds cause to make substantive revisions to an application after publication of the notice, the applicant will be required to submit a new application, including an additional application fee, an offset project and any other required application submissions as specified under Section H of these regulations.

3. A new application is not required for changes which can be incorporated into the original application where such changes will not significantly affect the nature of the project first proposed and which will not significantly increase the Department's review and evaluation of the application originally submitted. Such changes must be submitted in writing prior to publication of the legal notice announcing the public hearing.

4. If the Secretary receives information which he believes may significantly alter the scope of the project, he may require the applicant to submit a new application to reflect the altered nature of the project.

#### K. Permit Transfers

1. Coastal Zone permits may be transferred in cases of real estate transfer, corporate mergers and acquisitions or other actions whereby ownership of the activity or facility changes. Permit transfers shall require a written request of the Secretary and shall be processed within 60 days of receipt of a request for transfer.

#### L. Abandoned Uses

1. Any existing facility which is determined to be abandoned shall not be reinstated except as otherwise provided in the Act.

2. Involuntary shutdown of a facility shall not be deemed abandonment or a loss of the facility's non-conforming use status if the Secretary can determine that the owner had no intention to abandon the use.

3. In determining whether or not the cessation of the use is temporary or an abandonment, factors such as, but not limited to, status of environmental permits and/or business licenses, maintenance of machinery and structures, owner presence and involvement to some degree in reinstating the use, and the duration of cessation shall be considered.

4. When, after investigation, the Secretary makes a preliminary determination that an existing use may be abandoned, he shall notify the owner/operator in writing, by registered mail, that he intends to declare the use abandoned. The owner/operator shall have sixty days from the receipt of said notice to demonstrate that there is or was no intention to abandon the use and when operation of the use will resume.

5. Within 120 days from the date of receipt by the owner/operator of the notice of abandonment, the Secretary shall render a decision of abandonment of the facility taking into consideration the response, if any, received from the owner/operator and shall give reasons therefore.

6. The Secretary shall issue a public notice of the decision, which decision may be appealed in accordance with the provisions of Section P of these regulations and 7 Del C. Section 7007.

#### M. Public Information

1. All correspondence, permit applications, offset proposals and any other supporting materials submitted by applicants or materials prepared by DNREC are subject to Delaware's Freedom of Information Act (29 Del C., Chapter 100) and the Department's FOIA policy.

#### N. Public Notification

1. At a minimum, the Secretary shall notify the public by legal notice when the following events occur:

- a) The receipt of a request for status decision.
- b) The decision by the Secretary of a status decision request.
- c) The decision by the Secretary to consider a facility/use as abandoned.
- d) The receipt of an application for a Coastal Zone Permit.
- e) The scheduling of all public hearings.
- f) The decision on all permit applications.
- g) The withdrawal of an application by the applicant.
- h) The receipt of a request for a permit transfer as specified in Section K.1.

2. All legal notices shall appear in one newspaper of statewide circulation and a second newspaper of local circulation in the county in which the proposed project is located. The Secretary will make every effort to publish legal notices on either Wednesdays or Sundays but may publish on other days when schedules require more expeditious handling of legal notices.

3. The Secretary shall also maintain a direct mail program whereby interested citizens may subscribe, free of charge, to a service where copies of all legal notices will be mailed directly to citizens. The Secretary shall advertise this service on an annual basis and renew subscriptions from interested citizens as requested. Failure of the Secretary to mail notices in a timely and accurate fashion shall not be cause for appeal of any action or decision of the Secretary.

#### O. Public Hearings

1. All public hearings shall be held in the county in which the proposed project is to be located and within a reasonable proximity to the proposed project site.

2. The date, location, time and a brief description of the project shall be published at least twenty (20) days prior to the date of the hearing. A copy of the hearing notice shall be mailed to the applicant.

3. A written transcript of the hearing shall be made for the Department.

4. All hearings shall be conducted in accordance with the Delaware Administrative Procedures Act (29 Del. C. Chapter 101).

#### P. Appeals

##### P.1 Appeals of Decisions of the Secretary

a) Any person aggrieved by any permit or other decision of the Secretary under the Act may appeal same under Section 7007 of the Act and this section of the regulations.

b) Receipt of an appeal does not serve to stay the activity or approval in question.

c) Applicants must file notice of appeal with the Board within 14 days following announcement by the Secretary of his decision. The day after the date of the announcement shall be considered the beginning date of the 14-day appeal period.

d) The date at which a notice of appeal is considered to have been filed shall be the date the Board receives the notice of appeal at the Dover Office of the Secretary of DNREC, 89 Kings Highway, Dover, Delaware, 19901. Should the end date of the 14-day filing period fall on a Saturday, Sunday, or legal holiday, the ending date of the appeal period shall be 4:30 p.m. of the next working day.

e) It is the responsibility of the applicant to insure that the appeal is received at the Secretary's office within the appeal period.

f) If no appeal is received within 14 days following the date of the publication of the legal notice, the decision becomes final and no appeal will be accepted.

##### P.2 Procedures for Appeals Before the Coastal Zone Industrial Control Board

a) A majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum. A majority of the total membership of the Board shall be necessary to make a final decision on an appeal of a status decision or permit request.

b) The Board shall publish a notice of the hearing as prescribed in 29 Del. C. Chapter 101, Section 10122 at least 20 days prior to the hearing.

c) The Board must process and rule on the appeal in accordance with 29 Del. C., Chapter 101, Subchapter III.

##### P.3 Appeals of Decisions of the Coastal Zone Industrial Control Board

a) Any person aggrieved by a final order of the

Board as provided for in 29 Del C., Subsection 10128, may appeal the Board's decision to Superior Court in accordance with 29 Del C Subsection 10142. The Secretary may also appeal any decision of the Board as any other appellant.

b) The appeal shall be filed within 30 days of the day the notice of decision is mailed.

c) Appeals to Superior Court shall be carried out as specified in 29 Del. C., Chapter 101.

Q. Fees

1. The Secretary shall charge an application fee for Coastal Zone status decisions and permits as found in the Department's fee schedule as approved by the General Assembly.

2. Interested parties shall be entitled, at no charge, to copies of Coastal Zone Act status decisions and permit applications, provided such applications are not unreasonably bulky.

3. The applicant shall bear the costs of all public hearing notices, and the preparation of public hearing transcripts for the Department in addition to the application fee charged by the Department. Anyone desiring a typed transcript of the hearing must acquire their copy directly from the court reporter.

R. Enforcement

1. In cases of non-compliance with these regulations or the provisions of 7 Del. C. Chapter 70, the Secretary may revoke any permit issued pursuant to these regulations or exercise other enforcement authorities provided for in the Act.

2. If an applicant fails to carry out any offset project in accordance with the schedule outlined in their permit, the Secretary may take any enforcement action he deems appropriate, including revocation of the Coastal Zone permit.

S. Severability

1. If, at any time, provisions within these regulations relating to Sections E and I are invalidated by a court of law, the entire regulation shall become null and void with the exception of the footprints for non-conforming uses shown in Appendix B and the public notice provisions of Section N of these regulations.

2. If, at any time, provisions other than those relating to requirements in Sections E and I are invalidated by a court of law, then only those particular provisions will become null and void and all other provisions will remain operational.

**Appendix A**

Map of the Coastal Zone

**\*PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

**Appendix B**

Footprints of Nonconforming Uses

**\*PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

**APPENDIX C**

DNREC Guidance For Implementation and Interpretation of the Regulations Governing Delaware's Coastal Zone

A. Introduction

1. These regulations are built around two linked goals as developed by Governor Carper's Coastal Zone Regulatory Advisory Committee. This committee met in late 1996, through 1997 and culminated their work in early 1998 with signing of the Memorandum of Understanding that formed the basis for these regulations. These regulations are designed to ensure environmental improvement in the Coastal Zone while at the same time providing industry with the needed flexibility to remain competitive in a global marketplace.

2. In order to meet these two goals, a regulatory process comprised of regulatory exemptions, permitting requirements and offset provisions has been developed. This regulatory process has been designed so that each nonconforming use and new manufacturing uses can add new products, change existing products, increase production capacity, add new processes and modify existing processes or do any other activity so long as these activities are: 1) undertaken in a way that assures environmental improvement in the Coastal Zone; and 2) undertaken in such a way that they meet the six criteria outlined in the Coastal Zone Act.

3. For a more thorough explanation of the deliberations of the Advisory Committee and the foundation upon which these regulations are built, the reader is referred to the final Memorandum of Understanding dated March 19, 1998, and which is available in the offices of the Department at 89 Kings Highway, Dover, Delaware.

4. The following guidance is made available to interested citizens and applicants to better understand how these regulations will be interpreted and implemented by the Department. This guidance is, however, not a regulation and does not have the force of law. In the event of a conflict between this guidance and the regulations, the regulations will prevail.

B. Guidance in determining whether a permit is required

1. When a business wants to conduct an activity that may be one of the activities exempted from the permitting process as outlined in Section E, but the business is unsure of its determination, then the company may choose

to seek a status decision from the Secretary rather than proceeding with filing a Coastal Zone permit application.

2. The Advisory Committee recommended that DNREC establish a tiered system of Coastal Zone Act permitting and emphasized that such a system would promote efficiency to the permitting process by tailoring the extent of regulatory review to the expected impacts of the proposed project. Under the tiered approach outlined in the MOU, an industry would have been required to obtain a Coastal Zone Act permit only in those instances when a proposed new manufacturing facility, or a change in the operations of a heavy industrial or manufacturing facility, may have a negative impact on one or more of the six criteria cited in the Act.

3. These regulations have maintained that provision, however, they have removed the concept of a tiered system and in its place created essentially two levels of review. The first are activities that are clearly exempted from regulation because they have no environmental consequence, they are exempted in the Act or they were seen by the advisory committee to be activities that simply shouldn't require a permit. The second level is the full Coastal Zone act permit where any negative impact on the six criteria will trigger the permit requirement. In cases where the applicant is unsure of the impact or how their activity will be viewed by the Department, they may apply for what has historically been -- and will continue to be -- called the "status decision".

#### C. Environmental Goals and Indicators

1. DNREC will develop within 12 months of the ratification of the Coastal Zone Act MOU, a set of Coastal Zone environmental goals and appropriate environmental indicators which will highlight the most significant environmental challenges to the Coastal Zone. The indicators will serve several important purposes. First, they will assist DNREC in developing a more accurate picture of the environmental quality of the Coastal Zone, and measuring trends in this quality over time. Second, they will assist DNREC and project applicants by providing a means for evaluating the potential impacts of proposed changes in facility operations and proposed offsets on the Coastal Zone environment.

2. DNREC is responsible for defining, prioritizing, and making a matter of public record the set of goals and indicators for assessing the environmental quality in the Coastal Zone. Once goals for Coastal Zone have been established, DNREC will select a detailed set of indicators for use in assessing the quality of the environment as measured against those goals, and to monitor progress over time.

3. DNREC will periodically review and reissue the Coastal Zone environmental indicators (perhaps bi-annually). As conditions in the Coastal Zone change, and scientific methods for tracking and analyzing these changes

evolve, it may be necessary to add or change some indicators, or drop others. It may also be necessary to reprioritize them as some parameters of environmental health improve and others decline. DNREC's periodic review of the indicators will allow for these kinds of adjustments to be made.

4. DNREC's process for developing and prioritizing the indicators will include opportunities for formal public review and comment. To ensure that the public has opportunities to provide input into the development and any subsequent revision of the environmental indicators, the Advisory Committee recommended that DNREC establish an Environmental Indicator Technical Advisory Committee (EITAC).

5. A substantial proportion of the members of the EITAC should be technical experts. The Committee should also include representatives of various stakeholder groups, for example, heavy industry and manufacturing in the Coastal Zone, industry outside the Coastal Zone, agricultural interests, environmental advocacy groups and labor. EITAC meetings should be public and any reports generated by the Committee should be made available to the public.

#### D. Principles for Assessing an Application

1. Any negative environmental impact associated with a proposed project will have to be more than offset, thus assuring continuing improvement in the Coastal Zone environment. The Secretary will only grant Coastal Zone permits in those cases where the overall environmental impacts of the total application, both positive and negative, assure improvement in the quality of the environment in the Coastal Zone.

2. Therefore, activities proposed for a Coastal Zone permit which would measurably increase air emissions, water discharges, or would cause negative impacts on the Coastal Zone environment, shall include provisions for net environmental improvement of the Coastal Zone environment. These environmental improvements may be part of the permitted activity itself or realized through an enforceable offset proposal that will be implemented by a date agreed to by the company and DNREC.

3. DNREC will develop within 12 months of the ratification of the Coastal Zone Act MOU, a set of Coastal Zone environmental goals and appropriate environmental indicators which will highlight the most significant environmental challenges to the Coastal Zone. These indicators will be "prioritized" in accordance with their significance to achieving the Coastal Zone environmental goals. These prioritized indicators will provide Coastal Zone permit applicants a good idea of which types of future offset investments will yield the greatest environmental benefit and will allow a determination of which investments are most cost-effective. These indicators should also provide the rational basis for permit decisions that involve

offset proposals.

E. Evaluation of Offset Proposals

1. Although offsets within the Coastal Zone, in the same environmental medium and at the same site are preferred, there will be circumstances when offsets outside the Coastal Zone, in other media, or at another site within the zone provide greater environmental benefit or otherwise make sense, and will be considered by the Secretary.

2. While it is the applicant's responsibility to fully describe an offset proposal in the Environmental Impact Statement, it is the Secretary's responsibility to carefully assess whether the applicant's offset proposal will more than offset negative impacts of the project, and thus ensure environmental improvement in the Coastal Zone.

3. The Secretary shall make decisions on applicants' status decision requests and environmental impact assessments, in writing, based on all of the expected environmental impacts of the total project on the health of the Coastal Zone, including both positive and negative impacts. Impacts may be related to air and water emissions, or they may be related to other factors such as the viability of wildlife habitat, the protection of wetlands, or the creation or preservation of open space. The Secretary will develop and use a set of prioritized environmental indicators as a tool for assisting these determinations as discussed elsewhere in this guidance.

4. The Secretary shall consider likely cumulative impacts of proposed activities on the environment and the relevant environmental indicators. The Secretary shall also give consideration to the potential for negative cumulative impacts in situations where cross-media offsets are proposed.

5. In addition, the Secretary will give more weight to offset proposals that: 1) have established track records and are likely to succeed from a technical standpoint; and 2) will produce beneficial effects that are verifiable.

6. If an applicant includes in its permit application evidence of past voluntary environmental improvements and/or investments made prior to the time of application, DNREC will consider this history of environmental performance in determining the magnitude of the required offsets for the proposed project (with the understanding that the total project must assure improvement in the quality of the environment in the Coastal Zone).

7. The Secretary will also consider the applicant's ability to carry out such improvements as evidenced by its compliance history. Compliance with environmental standards and enforcement histories of facilities is not in itself a factor in determining the required magnitude of the potential offset project, but will be used by DNREC in gauging the applicant's ability to carry out the offset project with a minimum of supervision.

8. All offset projects must be incorporated into

the Coastal Zone permit as an enforceable condition of the permit. Since some of the benefits of "flexibility" are achieved immediately upon issuance of a permit (i.e. permission to proceed), and most benefits of "environmental improvement" are achieved over time, the permit itself must include well-defined and measurable commitments or accomplishments which are independently auditable by the Department, and available to the public via the Freedom of Information Act (FOIA). DNREC will also include inspection, reporting and/or notification obligations in the permit depending on the company's compliance record and the nature of the offset project.

9. In cases where an applicant fails to receive all required offset permits within 180 days and must therefore show good cause why a new permit application should not be required, good cause shall mean, but not be limited to, delays on the part of DNREC or other permitting authorities that could otherwise not have been expected and are considered by the Secretary to be extraordinary.

F. Guidance regarding activities within the Port Of Wilmington

1. All proposed manufacturing uses within the footprint of the Port of Wilmington are not in any way exempted from permitting requirements and must apply for and be issued a Coastal Zone Act permit if otherwise applicable.

2. Proposed uses within the Port of Wilmington which constitute heavy industry uses are prohibited.

3. The regulations do not prohibit or restrict activities involving containerized, palletized, or otherwise confined materials at any location within the Diamond State Port Corp. Bulk products, once off-loaded within the designated area, may be stored, transported, or otherwise used throughout the Port, subject to all other appropriate local, state and federal statutory and regulatory provisions.

4. The MOU negotiated by the Advisory Committee goes to some length to define the area that is the Port of Wilmington, some of which area is actually owned by the Diamond State Port Corporation. Regardless of the definition of the Port, it is nonetheless the equivalent of a "footprint" as that term is used to define other areas of industrial activity within the Zone. Therefore the definition of the Port as negotiated in the MOU is not repeated within the definitions section of these regulations but is rather transformed into a map or footprint similar to the other non-conforming industrial uses found in Appendix B of the regulation.

5. The current boundary of the Port of Wilmington is the area beginning at the intersection of the right of way of US Route I-495 and the southern shore of the Christina River; thence southward along said I-495 right of way until the said I-495 right-of-way intersects the Reading Railroad Delaware River Extension; thence southeast along the said Reading Railroad Delaware River Extension to its

point of intersection with the Conrail Railroad New Castle cutoff; thence southward along the Conrail Railroad New Castle cutoff until it intersects the right of way of U.S. Route I-295; thence eastward along said I-295 right of way until the said I-295 right of way intersects the western shore of the Delaware River; thence northward along the western shore of the Delaware River as it exists now to the confluence of the Christina and Delaware Rivers; thence westward along the southern shore of the Christina River to the beginning point of the intersection of the said I-495 right of way and the Southern shore of the Christina River.

#### G. Coastal Zone Report

1. To ensure that the public is kept fully informed about the regulatory process under the Coastal Zone Act and about the quality of the Coastal Zone generally, the Secretary will issue a report twelve months after the regulations are promulgated, and every twenty-four months thereafter. The report will include:

a) A description of progress towards environmental goals developed by DNREC for the Coastal Zone;

b) Information on the general trends in the environmental indicators, in the form of narrative text as well as charts and graphs that will be easily understandable to a lay reader;

c) A list of permits issued, a brief description of the status of activities under those permits, and a review of selected existing permits and actual versus projected environmental benefits; and

d) A description of the cumulative impacts of permitted activities on the environmental indicators.

Appendix D

Permitting Flow chart

**\*PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

Appendix E

Delaware's Coastal Zone Act

**\*PLEASE CONTACT THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL FOR A COPY OF THIS DOCUMENT.**

## DIVISION OF AIR AND WASTE MANAGEMENT AIR QUALITY MANAGEMENT SECTION

Statutory Authority: 7 Delaware Code,  
Chapter 60 (7 Del.C. Ch. 60)

Secretary's Order No. 99-A-0022

Re: **Proposed Amendments to Regulation No. 25,  
Requirements for Preconstruction Review of the  
Regulations Governing the Control of Air Pollution**

Date of Issuance: April 15, 1999

Effective Date of the Regulatory Amendments: May 11, 1999

### I. Background

On Tuesday, March 23, 1999, at approximately 6:00 p.m., a public hearing was held in the DNREC Auditorium at 89 Kings Highway, Dover, Delaware. The purpose of the hearing was to receive comment on proposed amendments to Regulation No. 25, entitled *Requirements for Preconstruction Review of the Regulations Governing the Control of Air Pollution*. Thereafter, the Hearing Officer prepared his report and recommendation in the form of a memorandum to the Secretary dated April 14, 1999, and that memorandum is expressly incorporated herein by reference.

### II. Findings and Conclusions

All of the findings and conclusions contained in the Hearing Officer's Memorandum dated April 14, 1999, are expressly incorporated herein and explicitly adopted as the findings and conclusions of the Secretary.

### III. Order

In view of the above, I hereby order that the proposed amendments to Regulations No. 25, *Requirements for Preconstruction Review*, of the *Regulations Governing the Control of Air Pollution* as proposed in the Hearing Draft of the Regulation (with the additional change suggested in AQM's March 30, 1999, memorandum) be promulgated in the manner and form provided for by law.

### IV. Reasons

Adopting the proposed amendments to the *Regulations Governing the Control of Air Pollution* will further the policies and purposes of 7 Del.C. Chapter 60, because it will allow for the construction of new major sources and the modification of existing major sources that emit volatile organic compounds and nitrogen oxides in Delaware in a manner intended to protect the environment. This rulemaking was not opposed in any way by the public or the regulated community. In addition, this amendment is

intended to address deficiencies that the United States Environmental Protection Agency found in Delaware's regulation of these pollutants.

Nicholas A. Di Pasquale  
Secretary

REGULATION NO. 25  
REQUIREMENTS FOR PRECONSTRUCTION REVIEW

01/11/93 ~~04/11/99~~ 5/11/99

Section 1 - General Provisions

1.1 Requirements of this regulation are in addition to any other requirements of the State of Delaware Regulations Governing the Control of Air Pollution.

1.2 Any stationary source which will impact an attainment area or an unclassifiable area as designated by the U.S. Environmental Protection Agency (EPA) pursuant to Section 107 of the Clean Air Act Amendments of 1990 (CAA), is subject to the regulations of Section 3, Prevention of Significant Deterioration (PSD).

1.3 Any stationary source which will impact a non-attainment area as designated by the EPA pursuant to Section 107 of the CAA is subject to the regulations of Section 2, Emission Offset Provisions (EOP).

1.4 A source may be subject to PSD for one pollutant and to EOP for another pollutant, or may affect both attainment or unclassifiable areas and a non-attainment area for the same pollutant.

1.5 Any emission limitation represented by Lowest Achievable Emission Rate (LAER) may be imposed by the Department pursuant to regulations adopted under Section 2 herein notwithstanding any emission limit specified elsewhere in the State of Delaware Regulations Governing the Control of Air Pollution.

1.6 Any emission limitation represented by Best Available Control Technology (BACT) may be imposed by the Department pursuant to regulations adopted under Section 3 herein notwithstanding any emission limit specified elsewhere in the State of Delaware Regulations Governing the Control of Air Pollution.

1.7 No stationary source shall be constructed unless the applicant can substantiate to the Department that the source will comply with any applicable emission limit or New Source Performance Standard or Emission Standard for a Hazardous Air Pollutant as set forth in the State of Delaware Regulations Governing the Control of Air Pollution.

1.8 Any stationary source that implements, for the purpose of gaining relief from Regulation 25, Section 3, by any physical or operational limitation on the capacity of the source to emit a pollutant, including (but not limited to) air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted,

stored, or processed, shall be treated as part of its design and the limitation or the effect it would have on emissions is enforceable, notwithstanding any emission limit specified elsewhere in the State of Delaware Regulations Governing the Control of Air Pollution. If a source petitions the Department for relief from any resulting limitation described above, the source is subject to review under Regulation 25, Sections 2 and 3 as though construction had not yet commenced on the source or modification.

1.9 Definitions - For the purposes of this regulation

A. "Major Stationary Source" - See Sections 2.2 and 3.0

B. "Major Modification"

1. Major modification means any physical change or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the CAA.

2. Any net emissions increase that is significant for either volatile organic compounds or nitrogen oxides shall be considered significant for ozone.

3. A physical change or change in the method of operation shall not include:

i. Routine maintenance, repair and replacement;

ii. Use of an alternative fuel or raw material by reason of an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

iii. Use of an alternative fuel by reason of an order or rule under Section 125 of the CAA;

iv. Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

v. Use of an alternative fuel or raw material by a stationary source which:

a. The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any previously issued permit condition which was established after January 6, 1975.

b. The source is approved to use under any previously issued PSD permit or under Regulation 25, Section 3.

vi. An increase in the hours of operation or in the production rate, unless such change would be prohibited under any previously issued permit condition which was established after January 6, 1975;

vii. Any change in ownership at a stationary source.

C. "Net Emissions Increase"

1. Net emissions increase means the amount by which the sum of the following exceeds zero:

i. Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source; and

ii. Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

2. An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

i. The date five years before construction on the particular change commences; and

ii. The date that the increase from the particular change occurs.

3. An increase or decrease in actual emissions is creditable only if the Department has not relied on it in issuing a permit for the source under this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

4. An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

5. An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

6. A decrease in actual emissions is creditable only to the extent that:

i. The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

ii. It is enforceable at and after the time that actual construction on the particular change begins; and

iii. It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

iv. It has not been adopted by the Department as a required reduction to be made part of the SIP or it is not required by the Department pursuant to an existing requirement of the SIP.

7. An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

D. "Potential to Emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on

emissions is enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

E. "Stationary Source" means any building, structure, facility or installation which emits or may emit any air pollutant subject to regulation under the CAA.

F. "Building, Structure, Facility, or Installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively). For purposes of Section 2, this definition shall apply only to the "Building, Structure or Facility".

G. "Emissions Unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the CAA.

H. "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition or modification of an emissions unit) which would result in a change in actual emissions.

I. "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

1. Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

2. Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

J. "Necessary Preconstruction Approvals or Permits" means those permits or approvals required under Delaware air quality control laws and regulations.

K. "Begin Actual Construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction or permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

L. "Best Available Control Technology" means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each

pollutant subject to regulation under CAA which would be emitted from any proposed major stationary source or major modification which the Department, on a case-by-case basis, takes into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under Regulation 20 and 21. If the Department determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

**M. "Baseline Concentration"**

1. Baseline concentration means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

i. The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph 1.9M(2);

ii. The allowable emissions of major stationary sources which commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

2. The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

i. Actual emissions from any major stationary source on which construction commenced after January 6, 1975; and

ii. Actual emissions increases and decreases at any stationary source occurring after the baseline date.

**N. "Baseline Date"**

1. Baseline date means the earliest date after August 7, 1977, on which the first complete application is submitted by a major stationary source or major modification subject to the requirements of Regulation 25, Section 3.

2. Baseline date means the earliest date after August 7, 1977, but before the effective date of this regulation, on which the first complete application by a

major stationary source or major modification which would have been subject to the requirements of Regulation 25, Section 3 if application were submitted after the effective date of this regulation.

3. The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

i. The area in which the proposed source or modification would construct is designated as attainment or unclassifiable for the pollutant on the date of its complete application under this section; and

ii. In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant. O. "Baseline Area"

1. Baseline area means any intrastate area (and every part thereof) designated as attainment or unclassifiable in which the major source or major modification establishing the baseline date would construct or would have an air quality impact equal to or greater than 1  $\mu\text{g}/\text{m}^3$  (annual average) of the pollutant for which the baseline date is established.

2. Area redesignations cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

i. Establishes a baseline date, or

ii. Is subject to this section.

P. "Allowable Emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

1. The applicable standards as set forth in Regulations 20 and 21;

2. Other applicable Delaware State Implementation Plan emissions limitations, including those with a future compliance date; or

3. The emissions rate specified as an enforceable permit condition, including those with a future compliance date.

Q. "Secondary Emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

1. Emissions from ships, trains, or other vehicles coming to or from the new or modified stationary source; and

2. Emissions from any offsite support facility(s) which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

R. "Innovative Control Technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy economics, or non-air quality environmental impacts.

S. "Fugitive Emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

T. "Actual Emissions":

1. Actual emissions means the actual rate of emissions of a pollutant from an emission unit, as determined in accordance with subparagraphs (2) through (4) below.

2. In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Department shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

3. The Department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

4. For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

U. "Complete" means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

V. "Significant"

1. Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (TPY)

Sulfur dioxide: 40 TPY

Particulate matter: 25 TPY

Ozone: New Castle and Kent Counties - 25 TPY of either volatile organic compounds or nitrogen oxides \*

Sussex County - 40 TPY of either volatile organic compounds or nitrogen oxides \*

Lead: 0.6 TPY

Asbestos: 0.007 TPY

Beryllium: 0.0004 TPY

Mercury: 0.1 TPY

Vinyl chloride: 1 TPY

Fluorides: 3 TPY

Sulfuric acid mist: 7 TPY

Hydrogen sulfide (H<sub>2</sub>S): 10 TPY

Total reduced sulfur (including H<sub>2</sub>S): 10 TPY

Reduced sulfur compounds (including H<sub>2</sub>S): 10 TPY

PM<sub>10</sub> particulate: 15 TPY

\* Note: Increases in net emissions shall not exceed 25 tons per year in New Castle and Kent Counties, or 40 tons per year in Sussex, when aggregated with all other net increases in emissions from the source over any period of five consecutive calendar years which includes the calendar year in which such increases occur. No part of the five consecutive years shall extend before January 1, 1991.

2. "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the CAA that paragraph 1.9 V.(1) does not list, any emissions rate.

3. Notwithstanding paragraph 1.9 V.(1), "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within ten kilometers of a Class I area, and have an impact on such area equal to or greater than 1 µg/m<sup>3</sup>, (24-hour average).

W. "Fixed capital cost" means the capital needed to provide all the depreciable components.

X. "Lowest Achievable Emission Rate (LAER) means the same as defined in Regulation No. 1, "Definitions and Administrative Principles".

Y. "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceed 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this regulation. In determining lowest achievable emission rate (LAER) for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

Z. "Ozone Transport Region" means the region designated by section 184 of the federal *Clean Air Act* and comprised of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia and northern Virginia.

AA. "Permanent" (Reductions) means that the actual emission reductions submitted to the Department for certification have been incorporated in a permit or a permit condition or, in the case of a shutdown, the permit to operate for the emission unit(s) has been voided.

BB. "Quantifiable" (Reductions) means that the amount, rate and characteristics of emission reductions can be determined by methods that are considered reliable by the Department and the Administrator of the EPA.

CC. "Real" (Reductions) means reductions in actual emissions released into the atmosphere.

DD. "Surplus" (Reductions) means actual emission reductions below the baseline (see Section 2.5(B)) not required by regulations or proposed regulations, and not used by the source to meet any state or federal regulatory requirements.

EE. "Enforceable" means any standard, requirement, limitation or condition established by an applicable federal or state regulation or specified in a permit issued or order entered thereunder, or contained in a SIP approved by the Administrator of the U.S. Environmental Protection Agency (EPA), and which can be enforced by the Department and the Administrator of the EPA.

01/11/93 ~~xxx/xx/99~~ [5/11/99]

Section 2 - Emission Offset Provisions (EOP)

2.1 Applicability - The provisions of this Section shall apply to any person responsible for any proposed new major stationary source or any proposed major modification.

2.2 For purposes of Section 2, "major stationary source" means

A. Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Clean Air Act, except for either volatile organic compound or nitrogen oxides, or

B. Any stationary source of air pollutants which emits, or has the potential to emit either volatile organic compounds or nitrogen oxides in the following amounts:

1. New Castle & Kent Counties - 25 tons per year of either volatile organic compounds or oxides of nitrogen

2. Sussex County - For areas in ozone attainment, ozone marginal, or ozone moderate nonattainment areas and located in the ozone transport region - 50 tons per year volatile organic compounds or 100 tons per year of oxides of nitrogen, or

2. For serious ozone nonattainment areas - 50 tons per year of either volatile organic compounds or oxides of nitrogen, or

3. For severe ozone nonattainment areas - 25 tons per year of either volatile organic compounds or oxides of nitrogen, or

4. For extreme ozone nonattainment areas - 10 tons per year of either volatile organic compounds or oxides of nitrogen.

C. Any physical change that would occur at a stationary source not qualifying under paragraph (A) or (B) as a major stationary source, if the change would constitute a major stationary source by itself, or

D. A major stationary source that is major for either volatile organic compounds or nitrogen oxides shall be considered major for ozone, and "installation" means an identifiable piece of process, combustion or incineration equipment.

2.3 For the purposes of Sections 2.4 and 2.5 of this regulation, emission units located in areas designated as attainment or marginal nonattainment areas that are located within the ozone transport region shall be considered located in a moderate ozone nonattainment area.

2.4 Conditions for Approval - No person subject to the provisions of subsection 2.1 shall install a major stationary source of volatile organic compounds or of nitrogen oxides, or make a major modification to a source which will cause or contribute to any violation of the national ambient air quality standards for ozone within an area of non-attainment for that pollutant unless the following conditions are met:

A. The new major source or the major modification is controlled by the application of lowest achievable emission rate (LAER) control technology.

B. All existing sources in the State owned or controlled by the owner of the proposed new or modified source are in compliance with the applicable local, State and federal regulations or are in compliance with a consent order specifying a schedule and timetable for compliance.

~~C. To the extent that allowable emissions of VOC from the new major stationary source or major modification will exceed the growth allowance in the State Implementation Plan, an emission reduction from existing sources shall be provided prior to start-up of the applicable source such that total allowable emissions from the existing sources and new major stationary sources will be less than that allowed from the existing source under the existing state implementation plan requirements. Where no emission limit exists under the state implementation plan, the level of emissions in existence at the time the permit application is filed shall be used in determining the baseline for the emission reduction.~~

For the purposes of satisfying offset requirements, the ratio of total actual emissions reductions of volatile organic compounds or nitrogen oxides to total allowable increased emissions of volatile organic compounds or nitrogen oxides shall be:

1. For New Castle & Kent Counties, 1.3 to 1, or
2. ~~For Sussex County, 1.15 to 1~~ The new or

modified source must satisfy the following offset requirements:

1. The ratio of total actual emissions reductions of volatile organic compounds or nitrogen oxides to total allowable increased emissions of volatile organic compounds or nitrogen oxides shall be:

- a. For moderate ozone nonattainment areas, 1.15 to 1, or
- b. For serious ozone nonattainment areas, 1.2 to 1, or
- c. For severe ozone nonattainment areas, 1.3 to 1, or
- d. For extreme ozone nonattainment areas, 1.5 to 1.

2. All offsets shall be federally enforceable at the time of application to construct and shall be in effect by the time the new or modified source commences ~~[construction]~~**[operation]**.

~~D. The emission reduction required by Section 2.3 C is implemented such that there is a net air quality benefit in the affected area.~~

~~E-1~~ The application for construction permit pursuant to Regulation No. ~~H-2~~ shall include an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

2. Public participation for the construction permit shall be pursuant to Regulation No. 2, Section 12.3 or 12.4 and 12.5.

#### 2.5 Criteria for Emission Reductions Used as Offsets

A. All emission reductions claimed as offset credits shall be real, surplus, **[permanent,]** quantifiable, and federally enforceable;

B. The baseline for determining credit for emissions reductions shall be the lower of actual or allowable emissions. The offset credit shall only be allowed for emission reductions made below the baseline;

C. Emission reductions claimed as offsets shall ~~[be included in the most recent rate of progress (ROP) emissions inventory and shall]~~ have occurred on or after January 1, 1991;

D. Credit for an emission reduction may be claimed for use as an offset to the extent that the Department has not relied on it in issuing any permit under this regulation and has not relied on it for demonstration of attainment or reasonable further progress;

E. Emission reductions shall not be used as offsets in an area with a higher nonattainment classification than the one in which they were generated.

F. Emission reductions claimed as offsets by a source must be generated from within the same nonattainment area or from any other area that contributes to a violation of the ozone National Ambient Air Quality Standard in the nonattainment area which the source is located.

2.6 Emission reductions generated in a state other than Delaware and which are placed in the emissions bank established pursuant to Regulation No. 34 of the State of Delaware ~~is~~ "Regulations Governing the Control of Air Pollution" may be used as offsets provided they are federally enforceable and meet, at a minimum, all the provisions of Regulation No. 34 and Sections 2.5(E), and (F) of this regulation.

03/29/88

Section 3 - Prevention of Significant Deterioration of Air Quality

#### 3.0 Definitions - For purposes of this Section 3

A. "Major Stationary Source"

(1) Major stationary source means:

(i) Any of the following stationary sources of air pollutants which emits or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the CAA: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(ii) Notwithstanding the stationary source size specified in paragraph 3.0 A.(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the CAA; or

(iii) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph 3.0 as a major stationary source, if the change would constitute a major stationary source by itself.

(2) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

3.1 Ambient Air Increments. In areas designated as Class I, II or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Maximum allowable increase  
(Micrograms per cubic meter)

Class I

Pollutant

Total suspended particulates:

|                       |    |
|-----------------------|----|
| Annual geometric mean | 5  |
| 24-hour maximum       | 10 |

Sulfur dioxide:

|                        |    |
|------------------------|----|
| Annual arithmetic mean | 2  |
| 24-hour maximum        | 5  |
| 3-hour maximum         | 25 |

Class II

Pollutant

Total suspended particulates:

|                       |    |
|-----------------------|----|
| Annual geometric mean | 19 |
| 24-hour maximum       | 37 |

Sulfur dioxide:

|                        |     |
|------------------------|-----|
| Annual arithmetic mean | 20  |
| 24-hour maximum        | 91  |
| 3-hour maximum         | 512 |

Class III

Total suspended particulates:

|                       |    |
|-----------------------|----|
| Annual geometric mean | 37 |
| 24-hour maximum       | 75 |

Sulfur dioxide:

|                        |     |
|------------------------|-----|
| Annual arithmetic mean | 40  |
| 24-hour maximum        | 182 |
| 3-hour maximum         | 700 |

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

3.2 Ambient Air Ceilings. No concentration of a pollutant shall exceed:

A. The concentration permitted under the national secondary ambient air quality standard, or

B. The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

3.3 Restrictions on Area Classification.

A. All Areas in the State of Delaware are designated Class II, but may be redesignated as provided in 40 CFR 52.51(g).

B. The following areas may be redesignated only as Class I:

- (1) Bombay Hook National Wildlife Refuge; and
- (2) A national park or national wilderness area established after August 7, 1977 which exceeds 10,000 acres in size.

3.4 Exclusions from Increment Consumption

A. Upon written request of the governor, made after notice and opportunity for at least one public hearing to be held in accordance with procedures established by the State of Delaware, the Department shall exclude the following concentrations in determining compliance with a maximum allowable increase:

(1) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(2) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(3) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

B. No exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph 3.4A(1) refers or the plan to which paragraph 3.4A(2) refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

3.5 Stack Heights

The provisions of Regulation 27 - STACK HEIGHTS, are applicable to this section.

3.6 Review of Major Stationary Sources and Major Modifications - Source Applicability and Exemptions.

A. No stationary source or modification to which the requirements of paragraphs 3.7 through 3.14 of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Department has authority to issue

any such permit.

B. The requirements of paragraphs 3.7 through 3.14 of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the CAA that it would emit, except as this section otherwise provides.

C. The requirements of paragraphs 3.7 through 3.14 of this section apply only to any major stationary source or major modification that would be constructed in an area designated as attainment or unclassifiable.

D. The requirements of paragraphs 3.7 through 3.14 of this section shall not apply to a particular major stationary source or major modification, if:

(1) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor requests that it be exempt from those requirements; or

(2) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

- (i) Coal cleaning plants (with thermal dryers);
- (ii) Kraft pulp mills;
- (iii) Portland cement plants;
- (iv) Primary zinc smelters;
- (v) Iron and steel mills;
- (vi) Primary aluminum ore reduction plants;
- (vii) Primary copper smelters;
- (viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;
- (ix) Hydrofluoric, sulfuric, or nitric acid plants;

- (x) Petroleum refineries;
- (xi) Lime plants;
- (xii) Phosphate rock processing plants;
- (xiii) Coke oven batteries;
- (xiv) Sulfur recovery plants;
- (xv) Carbon black plants (furnace process);
- (xvi) Primary lead smelters;
- (xvii) Fuel conversion plants;
- (xviii) Sintering plants;
- (xix) Secondary metal production plants;
- (xx) Chemical process plants;
- (xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input:

- (xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
- (xxiii) Taconite ore processing plants;
- (xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the CAA; or

(3) The source is a portable stationary source which has previously received a permit under this section, and

(i) The owner or operator proposal to relocate the source and emissions of the source at the new location would be temporary; and

(ii) The emissions from the source would not exceed its allowable emissions; and

(iii) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(iv) Reasonable notice is given to the Department prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the Department not less than ten days in advance of the proposed relocation unless a different time duration is previously approved by the Department.

E. The requirements of paragraphs 3.7 through 3.14 of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as non-attainment.

F. The requirements of paragraphs 3.8, 3.10, and 3.12 of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification:

(1) Would impact no Class I area and no area where an applicable increment is known to be violated, and

(2) Would be temporary.

G. The Department may exempt a stationary source or modification from the requirements of paragraph 3.10 with respect to monitoring for a particular pollutant if:

(1) The emissions increase of the pollutant from the new source or the net emissions increase of the pollutant from the modification would cause, in any area, air quality impacts less than the following amounts:

Carbon monoxide: 575 ug/m<sup>3</sup>, 8-hour average;

Nitrogen dioxide: 14 ug/m<sup>3</sup>, annual average;

Total suspended particulate: 10 ug/m<sup>3</sup>, 24-hour average;

Sulfur dioxide: 13 ug/m<sup>3</sup>, 24-hour average;

Ozone (Note 1)

- Lead: 0.1 ug/m<sup>3</sup>, 24-hour average;
- Mercury: 0.25 ug/m<sup>3</sup>, 24-hour average;
- Beryllium: 0.0005 ug/m<sup>3</sup>, 24-hour average;
- Fluorides: 0.25 ug/m<sup>3</sup>, 24-hour average;
- Vinyl chloride: 15 ug/m<sup>3</sup>, 24-hour average;
- Total reduced sulfur: 10 ug/m<sup>3</sup>, 1-hour average;
- Hydrogen sulfide: 0.04 ug/m<sup>3</sup>, 1-hour average;
- Reduced sulfur compounds: 10 ug/m<sup>3</sup>, 1-hour average;
- PM<sub>10</sub> particulate: 10 ug/m<sup>3</sup>, 24-hour average

(2) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in paragraph 3.6G(1), or the pollutant is not listed in paragraph 3.6G(1).

**3.7 Control Technology Review**

A. A major stationary source or major modification shall meet each applicable emissions limitation of the State of Delaware's Air Pollution Control Regulations.

B. A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the CAA that it would have the potential to emit in significant amounts.

C. A major modification shall apply best available control technology for each pollutant subject to regulation under the CAA for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

D. For phase construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

Note 1: No de minimus air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform an ambient impact analysis including the gathering of ambient air quality data.

3.8 Source Impact Analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

- A. Any national ambient air quality standard in any air quality control region; or
- B. Any applicable maximum allowable increase over the baseline concentration in any area.

**3.9 Air Quality Models.**

A. All estimates of ambient concentrations required under this section shall be based on the applicable air quality models, data bases, and other requirements specified in the "Guideline on Air Quality Models" (OA-QPS 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, April, 1978 or its subsequent revisions). This document is incorporated by reference.

B. When an air quality impact model specified in the "Guideline on Air Quality Models" is inappropriate, the model may be modified or another model substituted. Such a change must be subject to the notice and opportunity for public comment under paragraph 3.14 of this section. Written approval of the Department must be obtained for any modification or substitution. Methods like those outlined in the "Workbook for the Comparison of Air Quality Models" (U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 17711, May, 1978 or its subsequent revisions) should be used to determine the comparability of air quality models.

**3.10 Air Quality Analysis**

**A. Preapplication Analysis.**

(1) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

- (i) For the source, each pollutant that it would have the potential to emit in a significant amount;
- (ii) For the modification, each pollutant for which it would result in a significant net emissions increase.

(2) With respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the Department determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(3) With respect to any such pollutant (other than non-methane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(4) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application, except that, if

the Department determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(5) The owner or operator of a proposed stationary source or modification of volatile organic compounds who satisfies all of the following conditions may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under paragraph 3.10A.

Condition 1: The new source is required to meet an emission limitation which specifies the lowest achievable emission rate for such source.

Condition 2: The applicant must certify that all existing major sources owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the applicant) in Delaware are in compliance with all applicable emission limitations and standards under the CAA (or are in compliance with an expeditious schedule approved by the Department).

Condition 3: Emission reductions ("offsets") from existing sources in the area of the proposed source (whether or not under the same ownership) are required such that there will be reasonable progress toward attainment of the applicable NAAQS. Only intrapollutant emission offsets will be acceptable (e.g., hydrocarbon increases may not be offset against SO<sub>x</sub>(reductions)).

Condition 4: The emission offsets will provide a positive net air quality benefit in the affected area (see 40 CFR Part 51 App. S). Atmospheric simulation modeling is not necessary for volatile organic compounds and NO<sub>x</sub>. Fulfillment of Condition 3 will be considered adequate to meet this condition for volatile organic compounds and NO<sub>x</sub>.

B. Post-construction monitoring. The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification conduct such ambient monitoring as the Department determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

C. Operations of monitoring stations. The owner or operator of a major stationary source or major modification shall meet the Quality Assurance Requirements for PSD Air Monitoring as preapproved by the Department during the operation of monitoring stations for purposes of satisfying paragraph 3.10 of this section.

3.11 Source Information. The owner or operator of proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under this section.

A. With respect to a source or modification to which paragraphs 3.8, 3.10, and 3.12 of this section apply, such

information shall include but not be limited to:

(1) A description of the nature, location, design capacity and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(2) A detailed schedule for construction of the source or modification;

(3) A detailed description as to what system of continuous emission reduction is planned for the source or modification, emission estimates, and any other information necessary to determine that best available control technology would be applied

B. Upon request of the Department, the owner or operator shall also provide information on:

(1) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate such impact; and

(2) The air quality impacts, and the nature and extent of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977 or the applicable baseline date(s), in the area the source or modification would affect.

### 3.12 Additional Impact Analyses.

A. The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

B. The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

### 3.13 Public Participation

A. Within 30 days after receipt of an application to construct, or any addition to such application, the Department shall advise the applicant of any deficiency in the application or in the information submitted. In the event of such a deficiency, the date of receipt of the application shall be, for the purpose of this section, the date on which the Department received all required information.

B. Within one year after receipt of a complete application, the Department shall make a final determination on the application. This involves performing the following actions in a timely manner:

(1) Make a preliminary determination whether construction should be approved, approved with conditions, or disapproved.

(2) Make available a copy of all materials the applicant submitted, a copy of the preliminary

determination, and a copy or summary of other materials, if any, considered in making the preliminary determination.

(3) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed source or modification would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and the opportunity for comment at public hearing as well as written public comment.

(4) Send a copy of the notice of public comment to the applicant and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: the chief executives of the city and county where the source or modification would be located and any comprehensive regional land use planning agency whose lands may be affected by emissions from the source or modification. Additionally, if the proposed source would have significant interstate impact, the Governor of that impacted state would be notified.

(5) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source or modification, alternatives to the source or modification, the control technology required, and other appropriate considerations.

(6) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing(s) in making a final decision on the approvability of the application. No later than ten days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Department shall consider the applicant's response in making a final decision. The Department shall make all comments available for public inspection in the same locations where the Department made available preconstruction information relating to the proposed source or modification.

(7) Make a final determination whether construction should be approved, approved with conditions, or disapproved pursuant to this section.

(8) Notify the applicant in writing of the final determination and make such notification available for public inspection at the same location where the Department made available preconstruction information and public comments relating to the source or modification.

### 3.14 Source Obligation.

A. Any owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a source or modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval

hereunder, shall be subject to appropriate enforcement action.

B. Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Department may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

C. Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of any other requirements under local or Federal law.

D. At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs 3.7 through 3.14 of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

### 3.15 Innovative Control Technology.

A. An owner or operator of a proposed major stationary source or major modification may request the Department in writing no later than 30 days after the close of the public comment hearing to approve a system of innovative control technology.

B. The Department shall, with the consent of the Governor of Delaware, determine that the source or modification may employ a system of innovative control technology, if:

(1) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(2) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph 3.7B by a date specified by the Department. Such date shall not be later than four years from the time of startup or seven years from permit issuance;

(3) The source or modification would meet the requirements of paragraphs 3.7 and 3.8 based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the Department;

(4) The source or modification would not be before the date specified by the Department:

(i) Cause or contribute to a violation of an applicable national ambient air quality standard; or

(ii) Impact any Class I area; or

(iii) Impact any area where an applicable increment is known to be violated; and

(5) All other applicable requirements including those for public participation have been met.

C. The Department shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(1) The proposed system fails before the specified date to achieve the required continuous emissions reduction rate; or

(2) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(3) The Department decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

D. If a source or modification fails to meet the required level of continuous emission reduction within the specified time period or the approval is withdrawn in accordance with paragraph 3.15C, the Department may allow the source or modification up to an additional three years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

April 1, 1999

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**DEPARTMENT OF PUBLIC SAFETY**  
**ALCOHOLIC BEVERAGE CONTROL COMMISSION**

Statutory Authority: 4 Delaware Code,  
Section 304(a)(1) (4 Del. C. 304(a)(1))

**ORDER**

Following notice published in the Register of Regulations, the News Journal and the Delaware State News and a public hearing held on April 1, 1999 on the proposed revisions to Rule 29, Delaware Alcoholic Beverage Control Commission ("the Commission") the Commission makes the following findings and conclusions:

**SUMMARY OF EVIDENCE AND INFORMATION  
SUBMITTED**

1. On June 18, 1998, the Commission held a public hearing to receive comment from the public as to whether to undertake a revision of Commission Rule 29 dealing with the publication of prices and post-offs by wholesalers. The Commission received both written submissions and oral comments in connection with the public hearing. The

comments received focused primarily on the ability of wholesalers to quickly move beer that is going out of code and other aging and/or discontinued products pursuant to the provisions of Rule 29. One licensed wholesaler expressed its belief that Rule 29 requires the posting and holding of prices in violation of the Sherman Anti-Trust Act. Another licensed wholesaler, while disagreeing that the rule violates the Sherman Anti-Trust Act, suggested the implementation of a hotline phone system to move out of code and discontinued products quickly. One retailer suggested that the rule be abolished in its entirety and favored having the Commission set and control prices. Another retailer submitted that retailers rely on the existing monthly publication notifying retailers of the wholesaler's prices but believed most retailers would not oppose a modification of the rule that gave every retailer access to the changed prices at the same time, and which provided for registration of the price changes with the Commission. Finally, the Enforcement Section of the Division of Alcoholic Beverage Control ("Enforcement") expressed concern with assuring that all retailers receive a fair opportunity to take advantage of price changes. No comments were received from the general public.

The Commission took no action with regard to Rule 29 but indicated that it had established a subcommittee to look at all of its rules and would receive further public comment in connection with a proposal to modify Rule 29.

2. On January 26, 1999, the Commission conducted a public hearing on a proposed amended Rule 29. At that hearing, licensees made suggestions for improving the Rule 29 proposal as published in the Register of Regulations on January 1, 1999 (2:9 Del.R. 1216). Representatives of the retail and wholesale segments of the alcohol industry indicated that the proposed daily price changes to a toll-free telephone number would pose a hardship to small retailers by causing them to continuously check to see whether price changes had been made. At least one licensee suggested that the Rule should allow only weekly changes in prices.

The written comment period remained open through January 31, 1999, as required by the Administrative Procedures Act. Written comments from one wholesaler included a proposal that the 3 day hold in Rule 29.3(a) on the availability of a new product should be deleted from the Rule as inconsistent with eliminating any type of "hold" in Rule 29. The Commission received no comments from the general public.

The Commission reconvened on February 18, 1999, following the close of the written comment period to consider and vote on the verbal and written comments concerning proposed Rule 29. The Commission determined that at least some of the proposed changes to the Rule were substantive changes requiring re-notice of the Rule. The Commission filed with the Register of Regulations ("the Register") an Order providing that it would re-notice a

revised proposal containing substantive changes (2:9 Del.R. 1630).

3. On March 1, 1999, the Commission published in the Register its revisions to proposed Rule 29 stemming from the public hearing held on January 26, 1999, and the written comment period subsequent thereto (2:9 Del. R. 1538). The Commission published notice in the Register, the News Journal and the Delaware State News that it would conduct a public hearing on the revised proposal on April 1, 1999.

On April 1, 1999, the Commission conducted a public hearing on the revised proposal to amend Rule 29. Chairman Balick outlined the changes made to Rule 29 as a result of the prior public hearing to those in attendance. The changes included a modification to the definition of a designated publication, procedures for providing notices of prices, post-offs and quantity discounts, a change in delivery time from 3 to 5 days, and the imposition of a duty on the part of wholesalers to fill orders for post-offs and quantity discounts, where the inability to fill the order was due to depletion of its stock, at the same price offered during the post-off or quantity discount when the stock is next available.

Enforcement expressed concern about the enforceability of the Rule and submitted that the Rule lacks any provision to provide Enforcement with a copy of the tapes of prices changed on the hotline on any given day. Enforcement also offered that a definition of a distressed product should be provided.<sup>1</sup>

One wholesaler recommended that the Commission hold off on trying to define a distressed product and leave the determination to the wholesalers. Wholesalers are not looking to sell at the lowest price they can and need to be able to move products going beyond shelf life or, for example, a product that they cannot move because the label has changed and the public perceives it as an old product. Another wholesaler expressed the opinion, through its counsel, that it is nearly impossible to define in writing a distressed or aged product with respect to wine, and that should be left to the wholesalers and consumers, but did see a distinction with products such as beer that have a born on or expiration date. Counsel through oral comments and

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1. The Commission notes that Enforcement did not oppose amending Rule 29 at the January 26, 1999 public hearing. In fact, Enforcement raised only three issues: the inclusion of notifying the Division of price changes, which was done; clarification of the change in delivery days from 3 to 5, which was done; and further definition or clarification of a distressed product, which is being referred to the Rules subcommittee.

written submission dated March 30, 1999, suggested clarification of the standards for determining a distressed item.

Counsel for the Delaware Retailers Association echoed the sentiment of Enforcement with respect to enforceability of the rule. In addition, counsel recommended that the rule be modified to require wholesalers to offer retailers a refund if the wholesaler makes a change to a price in the designated publication that is lower than the price that has been offered upon quantity discount. Counsel also expressed concern over the mailing and effective date of price provisions in paragraph 29.3.<sup>2</sup> The Commission clarified that the provision that prices are effective 3 days after mailing had been stricken from the rule.

Maryanne McGonegal, speaking on behalf of Sunset Committee Chair Senator DeLuca, expressed concern over the deletion of the statement of purpose from Rule 29. She also expressed an opinion that the file did not reflect that the Commission had received a reasoned analysis of the current Rule 29 from the Office of the Attorney General.<sup>3</sup> She further expressed concern that the Commission understand Enforcement's position.

At this point, the Chairman read into the record a letter from Senator DeLuca dated March 29, 1999, in reference to Rule 29 reminding the agency that it is under Sunset Review, and expressing his opinion that it is highly unusual for agencies to initiate substantive changes to Rules and Regulations during the Sunset process. Commissioner Coyle and Chairman Balick offered that the process to revise Rule 29 began before the Commission had been advised it was under Sunset review.

#### FINDINGS OF FACT

4. Proper notice of the hearing was provided as required by law for the promulgation of regulations, including publication in the Delaware Register of Regulations, the News Journal and the Delaware State News.

5. The public was given notice and an opportunity to

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2. At this point in the proceedings some brief confusion ensued over the Internet publication of the rule since Mr. Hedrick's version of the rule did not show the deletion of the 3 days. After a brief recess Enforcement determined that the version of the rule as published in the Register and on the Register's WEB site contained all of the appropriate blacklining and highlighting. Counsel for the Commission advised the Commission that it could proceed with the public hearing as it had complied with the publication requirements of 29 Del. C. § 10115.

provide the Commission with comments in writing and by oral testimony.

6. The licensees potentially affected by this rule making submitted extensive comments for the record, which are summarized in paragraphs 1-3 above.

7. The Commission finds that the concerns expressed by the Enforcement concerning enforceability of the Rule are addressed by the Rule as proposed in that each wholesaler is required to notify the Division via hard copy and/or electronically of any changes from the prices filed in the monthly publication.

8. The Commission finds from the evidence and information presented that the alcoholic beverage control industry and the technology available to that industry for the distribution of its products has evolved substantially.

9. The Commission further finds that modifications to Rule 29 are necessary to keep up with changes in the industry.

10. The Commission finds that the Rule as published in the Register on March 1, 1999, creates enforceable non-discriminatory procedures for timely notification of prices, post-offs, and quantity discounts of alcoholic liquor offered for sale by Delaware wholesalers to Delaware retailers, and provides a mechanism for retailers to have equal access to pricing information.

11. The Commission further finds that the issue of defining a distressed item is a matter that should be considered by the Rules subcommittee in the definition section of all of the rules which is currently under consideration. This will allow enforcement and the industry an opportunity make suggestions that can be incorporated at a later date.

#### CONCLUSIONS

12. The proposed amendments to Rule 29 were promulgated by the Commission in accordance with its statutory authority as set forth in 4 Del. C. ch. 3 which provides.

(a) The Commission shall:

(1) adopt and promulgate rules and regulations no inconsistent with this title or of any other law of the State, and all such rules and regulations shall have the force and

3. There is currently pending litigation concerning whether the original version of Rule 29 violates the Sherman Anti-Trust Act. See NKS Distributors, Inc. v. Delaware Alcoholic Beverage Control Comm'n., et al; Civil Action No. 98-359 MMS. Such an analysis would not be contained in the public file as it involves pending litigation and is therefore not subject to disclosure under 29 Del. C. § 10002(d)(9). See also Darling Apt. Co. v. Springer, Del. Supr., 22 A.2d 397 (1941).

effect of law.

4 Del. C. § 304(a)(1). See also State ex rel. Anheuser-Busch, Inc. v. Schultz, Del. Super., 154 A.2d 555 (1959).

13. The Commission concludes that Rule 29 as published in the Register on March 1, 1999, should be adopted and is in the best interest of the State of Delaware, the alcoholic beverage industry, and the consumers who buy the product.

14. Therefore, at the April 1, 1999 meeting, a quorum of the Commission unanimously voted to adopt Rule 29. Commissioner Schaeffer abstained from the vote since he had not participated in any of the prior proceedings concerns the proposed Rule changes.

The effective date of this Order shall be ten (10) days from the publication of this Final Order in the Register of Regulations.

IT IS SO ORDERED THIS 22nd day of April, 1999.

ALCOHOLIC BEVERAGE CONTROL COMMISSION

Adam L. Balick, Chairman

George J. Coyle, Commissioner

Ruth D. Morris, Commissioner

Herbert E. Schaeffer, Commissioner

**\* PLEASE NOTE THAT NO CHANGES WERE MADE TO THE RULE AS PROPOSED AND PUBLISHED IN THE MARCH 1999 ISSUE OF THE REGISTER AT PAGE 1538 (2:9 DEL.R. 1538). THEREFORE, THE FINAL RULE IS NOT BEING REPUBLISHED.**

### PUBLIC SERVICE COMMISSION

Statutory Authority: 26 Delaware Code,  
Section 209(a) (26 Del.C. 209(a))

**RULES OF PRACTICE AND PROCEDURE OF THE  
DELAWARE PUBLIC SERVICE COMMISSION Effective  
May 10, 1999**

Rules of Practice and Procedure PSC Docket No. 99-9

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Commission, in the exercise of its statutory duties and where circumstances reasonably require, from prescribing different procedures to apply to specific proceedings.

RULE 2. Definitions

“Application” - a document in which a person seeks a certification, permit, license, or other approval, ruling or authorization from the Commission.

“Complaint” - a formal or informal document or communication in which a person alleges that a person subject to the jurisdiction of the Commission has violated a statute, rule, regulation, or order within the Commission’s authority to enforce.

“Commission” - the Public Service Commission of Delaware.

“Filing” - any document submitted to the Commission as part of the Commission’s official records in any proceeding.

“Hearing Examiner” - a person assigned by the Commission to preside over a Commission proceeding and, thereafter, to prepare a report with recommendations for the Commission’s consideration.

“Intervenor” - a person who is admitted as a party pursuant to Rule 21 of these rules.

“Party” - a person who, as a matter of right or by Commission authorization, appears in and has a direct interest in a proceeding before the Commission.

“Person” - includes a natural person; a corporation, partnership, association, public trust, joint stock company, joint venture, or other group of persons, whether incorporated or not; a trustee or receiver of the foregoing; a municipality or other political subdivision of the State of Delaware; and any other governmental agency or any officer, agent or employee of such agency.

“Petition” - a request for relief which is not an application or complaint.

“Presiding Officer” - a Commissioner designated by the Commission to preside over a proceeding and to prepare a report, with recommendations, for the Commission’s consideration.

“Proceeding” - any matter assigned a docket number by the Secretary.

“Proof of Public Notice” - a certificate or affidavit reciting the date and manner notice was given to the public as may be required by statute, rule, or order.

“Proof of Service” - a certificate or affidavit reciting the date and manner of service upon the parties to a proceeding.

“Respondent” - a public utility or other person named as the subject of an investigation or complaint proceeding.

“Secretary” - the Secretary of the Commission, or any employee of the Commission designated by the Secretary and authorized by the Executive Director.

**RULES OF PRACTICE AND PROCEDURE OF THE DELAWARE PUBLIC SERVICE COMMISSION**

**CHAPTER 1. GENERAL PROVISIONS**

**RULE 1. Applicability and Construction of Rules, Specific Orders, and Waiver**

(a) These rules govern practice and procedure in all matters before the Commission and shall be liberally construed to secure a just, fair, convenient, economical and expeditious determination in accord with the Commission’s statutory and public responsibilities.

(b) Nothing in these rules shall preclude the

"Staff" - full-time professional employees of, and outside counsel and consultants retained by, the Public Service Commission who render advice to the Commission. The Staff may participate in any Commission proceeding and may advocate particular positions concerning the issues raised in such proceeding and file supporting material and testimony for the Commission's consideration.

**RULE 3. Address of Commission and Office Hours**

(a) The mailing address of the Commission is: "The Public Service Commission of Delaware, 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware 19904." All communications to the Commission shall be so addressed unless otherwise specifically directed.

(b) Unless otherwise provided by statute or Executive Order, the office of the Commission shall be open from 8:00 A.M. until 4:30 P.M. of each week day, except Saturdays, Sundays, and legal holidays observed by the State in Kent County, Delaware.

**RULE 4. Commission Meetings**

(a) The Commission shall meet for the transaction of its business at its office in Dover or at such other places within this State as the Commission may designate.

(b) Notice of all meetings of the Commission shall be given at least seven (7) days in advance by a conspicuous posting of written notice at the Commission's office in Dover and such other methods as the Commission may deem appropriate. An agenda shall be posted contemporaneously with the notice, subject to revisions made up until six (6) hours in advance of the meeting. The Secretary may make the notice and agenda available through the Commission's web page.

A majority of the members appointed to the Commission shall constitute a quorum and shall be sufficient for any final order of the Commission; provided, however, that a single Commissioner may sit as a Presiding Officer for the purpose of hearing testimony in any proceeding subject to Commission review. Any final decision concerning any matter before the Commission must be approved by the affirmative vote of the majority of all members appointed to the Commission.

**RULE 5. The Secretary**

(a) The Secretary shall have custody of the seal and official records of the Commission and shall be responsible for the maintenance and custody of its docket files, opinions, orders, rules, regulations, forms, and any schedules and tariffs filed with the Commission.

(b) All orders and other actions of the Commission shall be attested to by the Secretary.

(c) The Secretary shall mark the time and date of receipt or filing on each communication addressed to the Commission and on each pleading, report, exhibit,

deposition, transcript, and order received or filed. When deemed appropriate, the Secretary shall also assign a docket number to a filing that has been received.

(d) The Secretary shall maintain the schedule of fees and charges as approved by the Commission, for filings and the provision of copying and other similar services.

**RULE 6. Filing of Documents**

(a) All papers submitted for filing with the Commission shall include on the first page the caption and docket number of the proceeding if available; the name, mail and e-mail addresses, telephone and fax numbers of the person filing the document; and the name, mail and e-mail addresses, telephone fax numbers of the person representing the person filing the document.

(b) The Secretary may reject any filing that does not conform to these rules or is not accompanied by the appropriate filing fee or other approved payment by returning the filing with an explanation of the defect to be remedied, if allowed, within the time period specified by the Secretary.

(c) Unless otherwise directed by the Commission, designated Presiding Officer or Hearing Examiner, an original and ten (10) copies of all documents submitted for filing shall be provided to the Secretary, who may request additional copies when necessary.

(d) With prior approval of the Commission, its Executive Director, the designated Hearing Examiner or Presiding Officer, filings may be made by electronic medium.

(e) The Commission shall forward to the Public Advocate a copy of all applications submitted by public utilities and all formal complaints and petitions filed with the Commission, along with proof of a notice to be executed and returned with an acknowledged receipt pursuant to 29 Del. Code § 8808 (e). One copy of all initial filings and comments shall be served on the Division of the Public Advocate at its official address and a certificate of service indicating such service must accompany the filing with the Secretary.

(f) Each person filing a document with the Commission shall serve a copy of the document on each party named on the service list for the proceeding as maintained by the Secretary, if established, and any other person required to be served by rule, order, or law. Proof of such service shall be attached to the document to be filed or its cover letter.

(g) Unless otherwise specified by the Presiding Officer or Hearing Examiner, service should be made by: i) United States mail, first-class; ii) commercial courier service; or iii) personal delivery. Service by delivery through an electronic medium may be allowed only when authorized by the Commission, its Executive Director, Presiding Officer, or Hearing Examiner.

**RULE 7. Types of Filings and General Requirements**

(a) Filings shall include the following:

- (i) applications;
- (ii) petitions;
- (iii) complaints;
- (iv) answers;
- (v) motions;
- (vi) briefs;
- (vii) memoranda;
- (viii) exceptions; and
- (ix) comments.

(b) All petitions and other filings that allege facts not otherwise in the record must be accompanied by a signed, sworn verification. Where the filer is a corporation or an association, the verification shall be signed by a bona fide officer thereof.

(c) All filings must be accompanied by a signed certificate of service pursuant to Rules 6(f) and 6(g).

(d) Except as directed by the Commission, designated Presiding Officer or Hearing Examiner, all filings shall be on 8 1/2 inch by 11 inch sized paper with margins of at least one inch using type size no smaller than 12 pitch font.

**RULE 8. Applications**

(a) Applications shall be in numbered paragraphs and include the following:

- (i) the name, mail and e-mail addresses, telephone and fax numbers of the applicant;
- (ii) a description of the authorization, right, or approval sought;
- (iii) a description of any previous authorization or approval which will be affected;
- (iv) a concise recitation of the material facts to be relied upon;
- (v) a citation to the statute, rule, or order which authorizes the application;
- (vi) copies of all pertinent contracts, agreements, certificates, permits, tariffs, proposed tariffs, charters, by-laws, ordinances, resolutions or other writings referred to in the application, which shall be attached as exhibits. Copies of written material or orders which are of record with the Commission need not be attached to the application if reference is made to the appropriate docket and order numbers; and
- (vii) any information required by rule or order for a specific type of application.

(b) Applications shall be initially reviewed by the Commission and upon such review, may be i) published for public comment, ii) approved with or without conditions, iii) denied, iv) set for evidentiary hearing, or v) granted in part and denied in part.

(c) Applications may become the subject of an evidentiary hearing if the Commission determines that the

comments or the application require a hearing.

**RULE 9. Computing Time**

(a) In computing any time period under these rules, the first day of the designated period of time shall commence the next day after the event requiring the computation of the time period. The last day of the time period shall be included, unless it falls on a Saturday, Sunday, or a legal holiday by the laws of this State or the United States, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(b) Upon good cause shown, the Commission, or a designated Presiding Officer or Hearing Examiner, may extend the period of time prescribed by these rules.

**RULE 10. Public Access to Commission Records**

(a) The Secretary shall make available for public inspection upon reasonable request during the regular business hours of the Commission all of the "public records" of the Commission, as defined in 29 Del. C. § 10002 (d), subject to any privilege or proprietary treatment of the records.

(b) The Secretary may charge a fee to recover reasonable costs of copying.

**RULE 11. Submission of Confidential, Proprietary, and Privileged Material**

(a) A person may request that the Commission accord confidential treatment to some or all of the information contained in a document. In support of such a request, such person shall attest that the information is not subject to inspection by either the public or by other parties<sup>1</sup> unless an appropriate proprietary agreement is executed. There shall be a rebuttable presumption that information claimed to be confidential is confidential until ruled otherwise by the Commission.

If the claim of confidentiality is challenged by any person, then the person claiming confidential treatment for information must demonstrate in a petition to the Commission that the designated information is confidential as recognized by state law.

The party seeking proprietary treatment shall submit for filing one copy of the document without the confidential information, with an indication that claimed confidential information has been deleted.

(d) Upon any dispute over the confidential treatment of information, the matter shall be resolved by the Commission, designated Presiding Officer or Hearing Examiner.

(e) The Commission, Commission Staff, and the Division of Public Advocate shall have access to all

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1. For a listing of materials that are exempt from public disclosure, see 29 Del. C. § 10002(d).

documents for which confidential treatment has been claimed. Access to non-public information shall be made available to all other parties, including consultants retained by the Commission, Commission Staff, and the Division of Public Advocate, upon the execution of an appropriate agreement by the parties or entry of a protective order by the Commission or designated Presiding Officer or Hearing Examiner.

(f) Non-public information shall not be disclosed by the Commission, its Staff, the Division of the Public Advocate, and their consultants and any party to a proprietary agreement and its consultants except as authorized by law.

#### RULE 12. Ex Parte Communications

(a) No Commissioner or Commission Staff assigned to participate in any way in the rendering of a case decision shall discuss or communicate, directly or indirectly, respecting any issue of fact or law with any party or person except upon notice to, and opportunity for, all parties to participate. This rule shall not apply to communications required for the disposition of ex parte matters as authorized by law, or to communications, not prohibited by law, by and among Commission members and Commission Staff.

#### CHAPTER 2. HEARINGS

#### RULE 13. Appearances

(a) A person may appear before the Commission by filing: i) an entry of appearance; ii) a complaint; iii) an answer; iv) a petition to intervene; v) an application; or vi) comments. An attorney, officer, or other qualified authorized agent may appear on behalf of a corporation or association, whether incorporated or not, subject to the Rules of the Supreme Court of Delaware. The Commission, Executive Director, or designated Hearing Examiner may limit the number of representatives that a party may designate to be on the service list.

(b) Attorneys who are not members of the Delaware Bar may be permitted to appear *pro hac vice* before the Commission in accordance with Rule 72 of the Rules of the Supreme Court of Delaware. A motion for such admission shall be made by a member of Delaware Bar in a form complying with Official Form O of the Rules of the Delaware Supreme Court and shall be accompanied with the required fees. A separate motion for such admission must be made in each matter before the Commission. The member of the Delaware Bar moving such admission shall remain responsible for compliance with any rule or order of the Commission.

(c) An attorney appearing before the Commission shall conform to the standards required of members of the Delaware Bar. The Commission may deny, temporarily or permanently, the privilege of appearing before it if it determines that an attorney or other qualified officer or agent

has engaged in illegal, unethical, or improper behavior.

(d) The Public Advocate may appear in any proceeding before the Commission as a party as a matter of right.

#### RULE 14. Informal Complaints and Mediation

(a) An informal complaint may be made by letter, other writing, or via telephone to Commission Staff, which shall investigate the allegations and, having duly notified the person that is the subject of the informal complaint, request a response from such person. The Commission Staff shall attempt to resolve the informal complaint to the satisfaction of the parties. The Commission Staff shall prepare a report at the conclusion of the investigation and mediation process to summarize the dispute and the proposed resolution by the Commission Staff. The parties will have twenty (20) days to indicate in writing acceptance or rejection of the proposed resolution by Commission Staff.

(b) If resolution of the informal complaint by Commission Staff is not deemed satisfactory by the complainant or respondent, then the complainant may institute a formal complaint at any time, within two (2) years of the alleged violation, unless good cause is shown.

#### RULE 15. Formal Complaints

(a) A formal complaint shall be in numbered paragraphs and include the following:

- (i) name, mail and e-mail addresses, daytime telephone and fax numbers of the complainant;
- (ii) name of the person that is subject of the complaint;
- (iii) description of conduct, including all known facts, alleged to have violated a law, rule or order; and
- (iv) description of the relief requested.

(b) Formal complaints alleging violations of any matter within the Commission's jurisdiction shall be served by certified mail by the Secretary on the person that is the subject of the complaint and direct such person to file a response within twenty (20) days of the service, unless emergency relief is requested and appropriate.

(c) Except for investigations under Rule 14, any Commission Staff investigation of an alleged violation shall be deemed a formal complaint, and the notice of investigation shall, unless otherwise ordered, be served in a like manner as a formal complaint. Notice of this investigation to the public may be given in order to elicit public input.

#### RULE 16. Answer to Formal Complaint

(a) Within twenty (20) days after service of a formal complaint, or such other time as the Commission may order, the respondent shall file an answer with the Commission and a certificate of service indicating service on the complainant and any other party who may have intervened. The answer shall specifically admit or deny the factual allegations in the

complaint or that the party is without knowledge or information sufficient to answer the allegation. The answer should state clearly and concisely the facts and law relied upon, and set forth fully the nature of any defense.

(b) Except where the Commission shall have waived the service and filing of an answer, a respondent who fails to file a timely answer shall be deemed in default and the Commission may thereafter enter an order granting the relief requested or take such other action as it deems appropriate.

#### RULE 17. Resolution of Formal Complaints

(a) If a respondent and complainant reach an agreement on a formal complaint, then the complainant and the respondent shall execute and file with the Secretary a statement that the complaint has been resolved and the proceeding can be closed.

(b) If a formal complaint is not resolved by agreement, the complaint shall be assigned to a Hearing Examiner to conduct a hearing and prepare a Recommended Decision for the Commission's consideration.

#### RULE 18. Discovery Procedures

(a) Discovery may be conducted through written interrogatories, written data requests, requests for admissions, and or depositions. Discovery may be available to any party in proceedings before the Commission or to the Staff and Public Advocate in the investigation of any filing. No discovery is to be filed with the Commission or Hearing Examiner unless it is requested or submitted as part of a discovery dispute.

(b) Parties should begin any discovery as soon as possible after the commencement of the proceeding and discovery should be completed prior to the hearings. Leave to conduct discovery after the commencement of hearings may be granted for good cause shown.

(c) All interrogatories or written data requests shall be numbered in sequence by the party requesting the information.

(d) The Commission, designated Presiding Officer or Hearing Examiner may vary discovery provisions, in the interest of justice, and may direct the parties to employ electronic medium for the service of discovery.

(e) The parties are encouraged to pursue discovery through informal written or oral data requests or conferences.

(f) In rate or other expedited cases, responses to discovery must be served no later than fifteen (15) days, excluding holidays and weekends, after service of the discovery, unless otherwise directed by the Commission, the designated Presiding Officer or Hearing Examiner. In all other cases the information requested shall be provided within thirty (30) days of service, unless otherwise directed by the Commission, Presiding Officer, or designated Hearing Examiner.

(g) If a party objects to any discovery, then that party

must notify the party seeking the information within ten (10) days after service of the discovery of the objection and its grounds. Should the parties be unable to resolve any discovery dispute, then the party seeking the information shall file a motion to compel and attach the other party's objection. The Presiding Officer or Hearing Examiner may schedule oral argument on the motion.

#### RULE 19. Motions

(a) A party in any proceeding may file and serve a motion at any time, unless otherwise prohibited. A written motion shall set forth in numbered paragraphs a concise statement of the facts and law which support the motion and a specific request for relief.

(b) The Commission, Presiding Officer or Hearing Examiner may permit oral motions to be made on the record during a hearing or conference that is transcribed.

#### RULE 20. Notice

(a) Except in emergencies, notice of a formal hearing shall include the date, time and place of the hearing or hearings, a brief description of the subject matter and the manner in which the public may present its views. The Commission shall establish the appropriate public notice consistent with 26 Del. C. § 102A.

(b) After commencement of the initial hearing, any adjournments and continuances of the hearing may be scheduled and conducted on such dates as designated by the Commission, Hearing Examiner or Presiding Officer, either on the record or in writing to the parties.

#### RULE 21. Petitions for Leave to Intervene

(a) Any person, other than an original party to a proceeding or a party entitled to participate as a matter of right, must file a petition to intervene. Such petition shall set forth in numbered paragraphs the following:

(i) the name, identity, mail and e-mail addresses, telephone and fax numbers of the person seeking to intervene;

(ii) a description of the petitioner's interest in the outcome of the proceeding;

(iii) a concise statement of why the petitioner's interest will not be adequately represented by the parties to the proceeding or why participation in the proceeding would be in the public interest; and

(iv) a description of the relief requested.

(b) A petition to intervene shall be filed with the Commission no later than the date specified for the filing of such petitions in the public notice, or the initial hearing if no public notice is given. Late intervention may be sought and granted for good cause shown.

(c) The Commission may delegate to the designated Presiding Officer or Hearing Examiner the authority to grant or deny a party's intervention, subject to an interlocutory

appeal pursuant to Rule 28.

(d) Intervention shall be subject to such reasonable terms and conditions as the Commission or designated Presiding Officer or Hearing Examiner may prescribe.

#### RULE 22. Pre-hearing Conferences

(a) The Commission, Hearing Examiner or Presiding Officer, with or without motion, and upon written notice to all parties of record, may convene a prehearing conference. Each of the parties may be required to prepare a pre-hearing memorandum that addresses the following matters:

- (i) Proposed resolution of the proceeding or issues;
- (ii) Identification of issues the party expects to pursue;
- (iii) Identification of witnesses the party expects to present;
- (iv) Status of the party's discovery; and
- (v) Position on complete or partial settlement of the proceeding.

(b) Pre-hearing conferences may be conducted formally or informally. Proceedings at formal conferences shall be recorded by a Reporter. Agreements or stipulations by the parties and other matters resolved at informal conferences shall be reduced to writing by the Presiding Officer or Hearing Examiner, who will issue a pre-hearing memorandum. The memorandum will bind all parties, including those who, after having been duly notified, could have attended the conference but did not.

(c) The Hearing Examiner or Presiding Officer at such conference may, by either written or oral ruling, dispose of such procedural matters as may be necessary or appropriate to determine at that stage of the proceedings. All such rulings shall be binding upon all parties to the proceeding, subject to interlocutory appeal to the Commission and to subsequent modification for good cause shown.

#### RULE 23. Hearings

(a) Formal hearings and informal proceedings will be held before the Commission, a Commissioner appointed as Presiding Officer, or a Hearing Examiner appointed by the Commission.

(b) The Commission shall give notice of a hearing in a manner consistent with 26 Del. C. § 102A.

(c) Hearings shall be transcribed and the transcripts shall become part of the record.

(d) All witnesses shall present testimony that is sworn or affirmed and shall be subject to reasonable cross-examination.

#### RULE 24. Order of Proceeding and Burden of Proof

(a) The moving party shall open and close the presentation of evidence, except in those instances when the Commission, the designated Presiding Officer or Hearing

Examiner determines a different presentation, such as when the evidence is peculiarly within the knowledge or control of another party.

(b) If a party fails to appear at a scheduled hearing, then the designated Presiding Officer or Hearing Examiner may recommend to the Commission that it enter an order ruling against the party who failed to appear.

(c) The burden of proof shall be on the moving party, except where placed on another party by law or Commission order.

(d) All parties to hearings, their counsel and spectators shall conduct themselves in a proper manner. Disruptive demonstrations of any kind at hearings shall not be permitted. Any disregard by parties, attorneys or other persons of the rulings of the Commission, Presiding Officer or Hearing Examiner on matters of order or procedure may be noted on the record. The Presiding Officer or Hearing Examiner may, in his or her discretion, recess or continue any hearing when the deportment of witnesses, spectators, news media or other persons unduly disrupts or interferes with the proper conduct of such hearing.

#### RULE 25. Evidence

(a) The Commission may consider the Delaware Uniform Rules of Evidence as a guide but, in accordance with 26 Del. C. § 503 and 29 Del. C. §10125, shall not be bound by the technical rules of evidence.

(b) The parties are encouraged to agree upon any facts at issue, or upon the authenticity of any relevant documents. The agreement may be in writing or by oral statement made upon the hearing record. The Commission, Presiding Officer or Hearing Examiner upon reasonable notice to the parties, may require proof by record evidence of stipulated facts.

(c) Unless otherwise ordered, parties shall file prepared statements of testimony and exhibits in rate proceedings or other proceedings where directed by the Commission or the designated Presiding Officer or Hearing Examiner. All prepared statements of testimony shall be double-spaced on pages with numbered lines and have a cover page identifying the witness, the nature of the testimony (direct, rebuttal, etc.), the sponsoring party, and the caption of the proceeding.

(d) Exhibits shall be marked sequentially.

#### RULE 26. Subpoenas and Witnesses

(a) Upon application of any party or upon the initiative of the Commission, the designated Presiding Officer or Hearing Examiner will issue subpoenas to be served as provided in 26 Del. C. §504.

(b) The Commission, Presiding Officer or Hearing Examiner, upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, may quash, modify, or condition the subpoena if it is demonstrated to be unreasonable or oppressive.

(c) The Commission, designated Presiding Officer or Hearing Examiner may limit the number of witnesses or restrict evidence or its examination in the interest of justice and economy.

**RULE 27. Transcripts of Hearings**

(a) An official court reporter designated by the Commission shall make an official transcript (in both public and confidential versions when necessary) of the formal hearings and such other matters as directed by the Commission, Executive Director or designated Presiding Officer or Hearing Examiner.

(b) Parties desiring copies of the official transcript shall arrange to secure and pay for such copies from the official court reporter.

(c) A party's motion to correct the transcript of the record must be filed within ten (10) days after the transcript is filed in the proceeding. Any party objecting to such motion shall file an answer within five (5) days from the filing of the motion. The Commission, Presiding Officer or Hearing Examiner shall rule on the motion with or without hearing.

**RULE 28. Interlocutory Appeals to the Commission**

(a) Interlocutory appeals from rulings of the Presiding Officer or Hearing Examiner during the course of a proceeding may be taken to the full Commission by any party only where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest.

(b) Within three (3) days of the entry of the ruling from which the appeal is sought, a party shall file with the Commission and serve by hand delivery or overnight delivery upon all the other parties to the proceeding a Petition for interlocutory review. The Petition shall set forth in numbered paragraphs, not to exceed five (5) pages in length, the following:

- (i) a short statement of the case;
- (ii) a summary of the party's position; and
- (iii) the grounds supporting interlocutory appeal,

including citations to the record.

(c) Within three (3) days of service of the Petition for interlocutory review, any party may file an answer limited to five (5) pages in length.

(d) The proceeding shall continue pending Commission review of the Petition for interlocutory review unless the Presiding Officer or Hearing Examiner stays the proceeding pending Commission review.

(e) The Commission shall determine if the Petition and any answers thereto justify interlocutory review. If interlocutory review is granted, then it will be scheduled for oral argument before the Commission at its earliest convenience or a decision will be issued based on the written submissions. If no Commission action occurs within thirty

days of the Petition filing, then it shall be deemed denied by operation of law.

**RULE 29. Post-Hearing Briefs**

(a) The Commission, Presiding Officer or Hearing Examiner may direct the filing of post-hearing briefs or memoranda. A post-hearing brief shall contain a cover page with the caption of the proceeding, the name of the party, and the nature of the brief. The Commission or designated Presiding Officer or Hearing Examiner may, either in addition or as an alternative, direct the filing of proposed findings of fact and conclusions of law.

(b) The Commission, or designated Presiding Officer or Hearing Examiner may specify the length of the briefs or other post-hearing submissions, and any other format guidelines, including electronic medium.

(c) The Commission, Presiding Officer or Hearing Examiner may reject briefs or memoranda which do not conform to these rules or the rulings of the Presiding Officer or Hearing Examiner.

**RULE 30. Post Hearing Procedures for Hearings Conducted by Presiding Officer or Hearing Examiner**

(a) In accordance with 29 Del. C. Chapter 101, upon the completion of a proceeding, the Hearing Examiner or Presiding Officer shall prepare and submit to the Commission a report and recommendations which shall include a summary of the evidence, recommended findings of fact, recommended conclusions and the reasons therefor.

(b) The Executive Director or Secretary shall serve a copy of the report and recommendations on all parties and by cover letter indicate when exceptions should be filed and when the matter will be scheduled for the Commission's consideration.

**RULE 31. Exceptions**

(a) Any party may file with the Commission written exceptions to the findings and recommendation of the designated Presiding Officer or Hearing Examiner in numbered paragraphs that:

(i) identify each part of the Presiding Officer's or Hearing Examiner's findings and recommendations that is the subject of the exceptions.

(ii) refer to the portions of the record relied upon in support of each exception;

(iii) cite any authorities relied upon;

(iv) state all the grounds and reasons for exceptions, comments and arguments respecting the recommended decision or report and refer to the portions of any post-hearing brief or memorandum where the issue was more fully addressed; and

(v) set forth any request for oral argument.

(b) Any argument opposing a portion of the designated Presiding Officer's or Hearing Examiner's findings and

recommendation that is not raised by an exception shall be considered waived.

(c) Exceptions shall be filed within twenty (20) days of the date the findings and recommendations was served on the parties, unless the parties have agreed to a reduced time period or the Executive Director or Secretary has granted a longer time period to accommodate the Commission's meeting schedule.

RULE 32. Oral Argument before the Commission

(a) The Commission may exercise its discretion to hear argument on exceptions. Oral arguments shall be limited to a discussion of the legal or regulatory issues and a restatement of the facts in the record. No new evidence shall be presented at oral argument except by direction of the Commission, upon a motion to re-open the record.

RULE 33. Entry of Orders

(a) The Commission, acting through a majority of the members of Commission, shall execute an Order on matters properly before it for decision, unless the law allows otherwise. The Secretary shall serve the Order on all parties to the proceeding along with a cover letter that shall establish the entry date of issuance of the Order for the purpose of determining the time period for any challenge to the Order.

RULE 34. Post-Hearing Petitions for Relief

(a) Petition to Re-open Record. At any time after the close of the record any party desiring further hearing upon supplemental evidence may file a petition setting forth the grounds to re-open the record, a description of additional evidence to be introduced, and a statement of the reasons why such was not introduced prior to the close of the record. The petition and any answer thereto shall be referred to the designated Presiding Officer or Hearing Examiner for disposition.

(b) Petition for Rehearing and Reconsideration. Within thirty (30) days from the entry of an Order or decision of the Commission, any party may petition for rehearing and reconsideration, which shall set forth in numbered paragraphs the grounds for rehearing and reconsideration that are different from the arguments previously made to the Commission. Other parties shall have seven (7) days to file an answer. The Commission, in its discretion, may grant or deny the petition without a hearing, or set a hearing thereon. The filing of a timely petition for rehearing shall suspend the finality of the order that is the subject of the petition.

(c) If the Commission takes no action on a petition within sixty (60) days of the entry date of the Order, then the petition for rehearing and reconsideration shall be deemed denied by operation of law, and the Secretary shall notify in writing all parties of such denial by operation of law.

RULE 35. Compliance Filings

(a) Any party directed by a final Commission Order to undertake a compliance filing shall make the filing with the Secretary and serve all parties within fifteen days (15) from the service of the final Order, or such other time as the Commission may permit.

(b) The Commission shall retain jurisdiction to review all compliance filings to determine that they are in compliance with the Commission Order.

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**GOVERNOR'S APPOINTMENTS**

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| <b>BOARD/COMMISSION<br/>OFFICE</b>                                       | <b>APPOINTEE</b>   | <b>TERM OF<br/>OFFICE</b>                                |
|--|--|--|
| Alliance for Adolescent Pregnancy<br>Prevention Advisory Board           | Mr. Estelle H. Whitney, M.D.   | Pleasure of the<br>Governor                              |
| Board of Architects  | Ms. Susan J. Frederick   | 03/12/02   |
| Board of Audiologists, Speech Pathologists<br>and Hearing Aid Dispensers | Mr. Gary J. Marencin   | 03/30/02   |
| Board of Counselors of Mental Health                                     | Ms. Jean B. Gunnells<br>Mr. Arnold J. Swygert<br>Mr. James D. Wilson, Jr.                                    | 03/12/02<br>03/12/02<br>03/12/02                         |
| Board of Dental Examiners  | Dr. Karen S. Carter  | 01/09/01   |
| Cash Management Policy Board   | Mr. J. Douglas Hazelton  | 07/15/00   |
| Committee on Disposition of Unmarked<br>Human Burials                    | Mr. Ronald Thomas  | 03/30/00   |
| Council on Apprenticeship and Training                                   | Mr. D. Robert Buccini  | 04/30/00   |
| Council on Banking   | Mr. Robert Harra, Jr.<br>Mr. J. Nathan Hill  | 03/17/02<br>03/17/02                                     |
| Council on Housing   | Mr. Don Brown<br>Ms. Roseann Harkins<br>Mr. Joseph M. McDonough<br>Reverend John Ranney<br>Ms. Norma Zumsteg | 04/01/02<br>04/01/02<br>04/01/02<br>04/01/02<br>04/01/02 |
| Council on Real Estate Appraisers  | Ms. Arana Pettyjohn  | 03/30/02   |
| Council on Transportation  | Ms. P. Raquel Bushweller   | 03/09/02   |
| Court of Common Pleas, Commissioner                                      | Ms. Arlene Minus Coppadge<br>The Honorable Joseph W. Maybee  | 04/12/03<br>04/12/03                                     |
| Delaware Alcoholic Beverage<br>Control Commission                        | The Honorable Herbert E. Schaefer  | 03/30/02   |
| Delaware Arts Council  | Mr. Kevin Freel<br>Ms. Debora Hansen   | 03/17/02<br>03/17/02                                     |
| Delaware Association of Professional Engineers                           | Mr. Larry Tarabicos  | 03/30/03   |
| Delaware Bicycle Council   | Ms. Mary Davis   | 03/17/02   |
| Delaware Commission for Women  | Ms. Valerie Dunkle<br>Ms. Patricia Ann Rodriguez   | 03/30/02<br>11/15/99                                     |

**GOVERNOR'S APPOINTMENTS**

| <b>BOARD/COMMISSION<br/>OFFICE</b>                                  | <b>APPOINTEE</b>              | <b>TERM OF<br/>OFFICE</b>   |
|---|-------------------------------|-----------------------------|
| Delaware Commission for Women                                       | Mr. Richard Windsor           | 03/30/02                    |
| Delaware Economic and Financial<br>Advisory Council                 | The Honorable Joseph DiPinto  | Pleasure of the<br>Governor |
| Delaware Economic and Financial<br>Advisory Council                 | Mr. Robert Glen               | Pleasure of the<br>Governor |
|   | The Honorable Jack A. Markell | Pleasure of the<br>Governor |
|   | Mr. Darrell Minott            | Pleasure of the<br>Governor |
| Delaware Health Resources Board                                     | Mr. Thomas Ferry              | 03/30/02                    |
|   | Mr. Arthur Gregory            | 03/30/02                    |
|   | Ms. Joann Hasse               | 03/30/02                    |
|   | Mr. Robert Miller             | 03/30/02                    |
|   | Mr. Lloyd Mills               | 03/30/02                    |
|   | Dr. Ulder J. Tillman          | 12/30/00                    |
| Delaware Heritage Commission  | Mr. Norman Borish             | 03/30/02                    |
|   | Mr. Robert Byrd               | 03/30/00                    |
|   | Mr. Richard Carter            | 03/30/03                    |
|   | Ms. Gayle Chandler            | 03/30/01                    |
|   | Ms. Reba Hollingsworth        | 03/30/03                    |
|   | Mr. William Lowe              | 03/30/03                    |
|   | Ms. Cheyenne Luzader          | 03/30/02                    |
|   | Mr. John Paradee              | 03/30/02                    |
|   | Mr. Lewis Purnell             | 03/30/02                    |
|   | Mr. Harvey Rubenstein         | 03/30/01                    |
|   | Mr. Samuel Shipley            | 03/30/01                    |
|   | Dr. Ileana Smith              | 03/30/00                    |
|   | Ms. Jean Smith                | 03/30/01                    |
|   | Dr. Robert Stark              | 03/30/03                    |
| Delaware Open Space Council   | Mr. Harvey Marvel             | 03/17/03                    |
| Delaware Technical and Community Collage<br>Board of Trustees       | Mr. Craig T. Eliassen         | 07/15/00                    |
| Family Court, Commisioner   | Mr. Gary Evans Grubb          | 04/12/03                    |
|   | Mr. Frederic H. Kenney        | 04/12/03                    |
| Governor's Magistrate Screeing Committee                            | Mr. John T. Dorsey            | Pleasure of the<br>Governor |
| Delaware Year 2000 Contingency Planning and<br>Coordinating Council | Mr. Michael H. Vincent        | Pleasure of the<br>Governor |

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**GOVERNOR'S APPOINTMENTS**

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| <b>BOARD/COMMISSION<br/>OFFICE</b>                  | <b>APPOINTEE</b>         | <b>TERM OF<br/>OFFICE</b>   |
|---|--------------------------|-----------------------------|
| Office of Information Systems<br>Advisory Committee | Mr. Kristofer A. Younger | Pleasure of the<br>Governor |
| Paramedic Advisory Council                          | Mr. P. Brooke Banta      | 04/12/02                    |
|   | Mr. Keith Bowman         | 04/12/02                    |
|   | Mr. J. Allen Methany     | 04/12/02                    |
|   | Mr. David Mick           | 04/12/02                    |
|   | Mr. E. James Monihan     | 04/12/02                    |
|   | Mr. Michael P. Reynolds  | 04/12/02                    |
|   | Ms. Ronna Cobb           | 04/12/02                    |
| State Board of Accountancy                          | Mr. John A. McManus II   | 03/12/02                    |
| State Board of Registration for Land Surveyors      | Mr. Joseph J. Kliment    | 03/12/02                    |
| Superior Court                                      | Ms. Alicia B. Howard     | 04/12/03                    |
|   | Ms. Andrea M. Maybee     | 04/12/03                    |
| Sussex County Board of Elections                    | Mr. Charles E. Short     | 07/05/00                    |
| Tourism Advisory Board                              | Mr. Jacques Amblard      | 03/17/02                    |
| Unemployment Insurance Appeals Board                | Ms. Taube R. Carpenter   | 05/01/00                    |

## PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE  
ADOPTION OF RULES AND  
REGULATIONS TO IMPLEMENT  
THE PROVISIONS OF 26 DEL. C.  
CH. 10 RELATING TO THE  
CREATION OF A COMPETITIVE  
MARKET FOR RETAIL ELECTRIC  
SUPPLY SERVICE  
(OPENED APRIL 27, 1999)

PSC  
REGULATION  
DOCKET NO. 49

**NOTICE OF PROCEEDINGS BY THE PUBLIC  
SERVICE COMMISSION TO PROMULGATE RULES  
AND REGULATIONS TO IMPLEMENT VARIOUS  
PROVISIONS IN THE ELECTRIC UTILITY  
RESTRUCTURING ACT OF 1999  
(72 DEL. LAWS ch. 10)**

In March, 1999, the General Assembly passed, and the Governor enacted into law, the "Electric Utility Restructuring Act of 1999," 72 Del. Laws ch. 10 (March 31, 1999). The goal of the Act is to expeditiously transform the generation, supply, and retail sale of electricity from an integrated, regulated regime to a competitive enterprise where retail customers will have the opportunity to choose a supplier of electric supply service. The Act, and, in particular, the new Chapter 10 added to Title 26 of the Delaware Code, charts a course for the transition to this new era of a competitive retail market for electric supply service.

The Act charges the Public Service Commission ("the Commission") with the duty to adopt various rules and regulations to facilitate the transition to a competitive environment for retail electric supply and to protect consumers after the onset of customer choice. Pursuant to various provisions added by the Act, the Commission Staff has proposed rules and regulations pertaining to:

- (a) the certification of electric suppliers (26 Del. C. § 1012(a));
- (b) the protection of consumers, including provisions related to standardized billing information, the terms and conditions for service, the procedures for resolving customer and electric supplier disputes, the procedures for changing electric suppliers, and the standards for electric suppliers who offer environmentally-advantageous "Green Power" options (26 Del. C. § 1012(b));
- (c) the disclosure by each electric supplier of information, in a uniform format, about the fuel mix of electricity purchased by its customers (26 Del. C. § 1012(b));
- (d) the procedures for a retail customer's

return to Standard Offer Service, including provisions related to the amount of notice a retail customer must provide, the amount of time a returning customer must remain on Standard Offer Service, and the charges to be imposed for such return (26 Del. C. §§ 1005(a)(1)(v), 1005(b)(1)(vi), 1010(c)); and

(e) the implementation of net energy metering for residential and small commercial customers who own and operate a renewable-resource electric generation facility (26 Del. C. § 1014(d)).

By PSC Order No. 5068 (April 27, 1999), the Commission opened this docket to solicit comments and conduct proceedings concerning these proposed rules and regulations. The Commission intends to adopt rules and regulations pertaining to the above topics prior to the implementation dates for retail competition set forth in 26 Del. C. § 1003(b). The Commission has designated two Hearing Examiners to receive written suggestions, compilations of data, briefs, or other written materials concerning the proposed rules and to conduct such public hearings as may be required or desirable.

Pursuant to the authority granted by 26 Del. C. § 1015(a), the Commission has waived the procedures set forth in 29 Del. C. §§ 1131-36 and 10111-10128 for the purpose of adopting rules required by 26 Del. C. §§ 1010(c), 1012(a), 1012(b), and 1014(d). Copies of the proposed rules and regulations are not available in the Delaware Register of Regulations. You may obtain a copy of the proposed rules and regulations from the Commission at its Dover office at the address set out below during normal business hours. You may also obtain an electronic copy of the proposed rules and regulations by accessing the Commission's Internet website at:

<http://www.state.us.de.us/govern/agencies/pubservc/major/major1.htm>.

The Commission solicits suggestions, compilations of data, briefs, or other written materials concerning the proposed rules and regulations and any additional rules or regulations which may be necessary or desirable to implement the provisions of 26 Del. C. §§ 1010(c) and 1012. If you wish to submit such materials, you must file ten (10) copies with the Commission at the address given below on or before Wednesday, May 14, 1999. In addition, two (2) copies of all filed materials should be served upon the Division of the Public Advocate, Carvel State Office Building, 820 N. French Street, Wilmington, DE 19801.

Further, if you desire to participate in further proceedings to be held in this docket, you must submit with your comments (or by separate letter filed by May 14, 1999) a notice of your intent to participate. That notice should

include your name, business organization (if applicable), address, voice and facsimile telephone numbers, and Internet e-mail address. Only persons filing such notice will be included on the service list and be afforded notice of further proceedings. You should review PSC Order No. 5068 (April 27, 1999) to understand what procedural actions the Commission has taken with regard to this proceeding.

In addition, the designated Hearing Examiners will conduct a mandatory procedural conference concerning this matter beginning at 2:00 PM on May 19, 1999 in the Commission's Dover office. All persons desiring to participate in this docket must attend such conference.

For purposes of filing, the Commission's address is:

Public Service Commission  
Attn: PSC Regulation Docket No. 49  
861 Silver Lake Boulevard  
Cannon Building, Suite 100  
Dover, DE 19904

If you have a disability and wish to participate in these proceedings or to review the filings you should contact the Commission to discuss any auxiliary aids or services needed to facilitate your review or participation. You may contact the Commission in person, by writing, by voice telephone, or by use of the Telecommunications Relay Service (302) 739-4333. The Commission Staff is available to answer any questions concerning this proceeding. The Commission's toll-free telephone number in Delaware is (800) 282-8574. You may also make inquiries by voice telephone at (302) 739-4247 or by Internet e-mail to [cmcdowell@state.de.us](mailto:cmcdowell@state.de.us).

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## **PUBLIC SERVICE COMMISSION**

|                                     |                   |
|-------------------------------------|-------------------|
| IN THE MATTER OF ESTABLISHING       |                   |
| A WORKING GROUP UNDER               |                   |
| 26 <u>DEL.C.</u> §1014(c) TO DESIGN | <b>PSC</b>        |
| AND IMPLEMENT A CONSUMER            | <b>DOCKET</b>     |
| EDUCATION PROGRAM TO                | <b>NO. 99-156</b> |
| PREPARE THE CITIZENS OF             |                   |
| DELAWARE FOR RETAIL                 |                   |
| ELECTRICITY COMPETITION             |                   |
| (OPENED APRIL 27, 1999)             |                   |

### **PUBLIC NOTICE**

#### **NOTICE OF ESTABLISHMENT OF "CONSUMER EDUCATION WORKING GROUP" AND SOLICITATION FOR MEMBERS**

"The Electric Utility Restructuring Act of 1999" (hereafter, "the Act"), enacted into law on March 31, 1999, restructures the electricity supply industry in the State of Delaware on an implementation schedule as stated in 26 Del.C. §1003(b). Under 26 Del.C. §1014(c), the Public Service Commission ("PSC") is charged with establishing, by June 1, 1999, a working group to design and implement a consumer education program to prepare Delaware citizens for retail competition of electric supply. Section 1014(c) directs that such group shall consist of members from the General Assembly, the PSC, and the Division of Public Advocate as well as representatives from electric utilities, electric suppliers, the environmental community, consumers, and other interested persons. By PSC Order No. 5063 (April 27, 1999), the PSC established the "Consumer Education Working Group" under section 1014(c). By this notice, the PSC solicits members from the identified entities and communities to serve on such working group.

The Commission Staff will convene, at the earliest possible date, an initial meeting of all the potential participants listed in 26 Del.C. §1014(c) to begin formulating and implementing a customer education program. The Working Group will report periodically to the Commission on its activities and progress.

Any groups or any person representing groups and entities described in 26 Del.C. §1014(c) which wish to participate in the Consumer Education Working Group should submit to the Commission in writing on or before May 15, 1999, a notice of their interest to serve on such Working Group. Such notice should include their qualification(s) to be included in the Group. Such submission should include name(s), group(s) represented, position in such group(s), mailing address, daytime and alternative telephone numbers, fax number (if any), e-mail address (if any), and a description of the group's or person's interest or qualifications. Under PSC Order No. 5063, the Commission has delegated to the Executive Director of the Commission the discretion for appropriate disposition of such requests for participation.

Such notices shall be filed at the following address:

Public Service Commission  
Attn: PSC Docket No. 99-156  
861 Silver Lake Blvd.  
Cannon Building, Suite 100  
Dover, DE 19904

Individuals with disabilities who wish to participate in this proceeding should contact the Commission to discuss any auxiliary aids or services needed to facilitate such participation. Such contact may be in person, by writing, telephonically, or otherwise. The Commission's toll-free telephone number is 800-282-8574. The Commission Staff is available to answer queries at (302) 739-2107. Inquiries

may also be submitted by Internet e-mail to [rbarua@state.de.us](mailto:rbarua@state.de.us). For Text Telephone calls, call (302) 739-4333.

## PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE REVIEW  
OF A RETAIL COMPETITION  
RESTRUCTURING PLAN FILED BY  
DELMARVA POWER & LIGHT  
COMPANY AND THE  
DETERMINATION OF TRANSITION  
PERIOD RATES PURSUANT TO  
26 DEL. C. §§1005(a) & 1006(a)(1)  
(Filed April 15, 1999)

PSC  
DOCKET  
NO. 99-163

### PUBLIC NOTICE OF FILING OF RESTRUCTURING PLAN AND REVIEW BY THE PUBLIC SERVICE COMMISSION PURSUANT TO THE ELECTRIC UTILITY RESTRUCTURING ACT OF 1999 (72 DEL. LAWS ch. 10)

In March, 1999, the General Assembly passed, and the Governor enacted into law, the "Electric Utility Restructuring Act of 1999," 72 Del. Laws ch. 10 (March 31, 1999). The goal of the Act is to expeditiously transform the generation, supply, and retail sale of electricity from an integrated, regulated regime to a competitive enterprise where retail customers will have the opportunity to choose a supplier of electricity. The Act, and in particular the new Chapter 10 added to Title 26 of the Delaware Code, charts a course for the transition to this new era of a competitive market for retail electric supply service.

Under section 1005(a)(1) of this new Chapter 10, the Delaware Power & Light Company ("DP&L" or "the Company") must file with the Public Service Commission ("the Commission") a detailed restructuring plan for implementing retail competition in its service area. That plan (and accompanying revised tariffs and schedules) must include: (1) separate prices for electric supply, transmission, distribution, and other services; (2) proposed procedures for allowing retail customers direct access to electric suppliers; (3) a new optional time-of-use rate for electing residential customers; and (4) standards to measure and ensure service reliability after the implementation of retail competition. In addition, new section 1006(a)(1) requires the Commission, as part of its decision on DP&L's restructuring plan, to set several rates to be in effect during the statutorily-defined transition period. Under that section, the Commission must: (1) determine the "retail market price" for electric supply

service for each customer rate class; (2) recalculate base and fuel rates based upon a September 30, 1999 benchmark; (3) approve the separation of these recalculated rates and "retail market prices" into rates for electric supply, transmission, ancillary services, distribution, nuclear decommissioning costs, and other services; and (4) calculate an additional surcharge or credit for accrued, but previously deferred, fuel costs. The Commission must approve or modify the plan and determine the transition rates by August 2, 1999.

By PSC Order No. 5066 (April 27, 1999), the Commission opened this docket to conduct the proceedings required by 26 Del. C. §§1005(a) & 1006(a)(1). The Commission designated two Hearing Examiners to conduct proceedings in this matter on schedules to be set by them and to make a report and recommendations by August 3, 1999. The Commission expects to enter a final order on or before August 31, 1999.

If you wish to formally participate in these proceedings as a party hereto, with the right to submit evidence and to be represented by counsel, you must, in accordance with Rule 21 of the Commission Rules of Practice and Procedure, petition for, and be granted, leave to intervene in this docket. To be timely filed, all such petitions must be filed on or before Wednesday, May 14, 1999. In addition, if you wish to intervene, you must accompany your petition with a statement identifying your views of what will be the major issues to be considered in this proceeding and a short statement of your position on each such issue. These comments will be utilized by the Hearing Examiners to determine a procedural schedule in this proceeding. You should file an original and ten copies of your petition to intervene and accompanying comments with the Commission at the address given below. In addition, two copies of such petition and statement should be served upon DP&L. Only persons granted leave to intervene will be provided notice of further proceedings in this matter. You should review PSC Order No. 5066 (April 27, 1999) to understand what procedural actions the Commission has taken with regard to this proceeding.

In addition, the designated Hearing Examiners will conduct a mandatory procedural conference under Rule 22 of the Commission's Rules of Practice and Procedure beginning at 10:00 a.m. on May 19, 1999 in the Commission's Dover office. All persons entitled, granted, or seeking leave to intervene must attend such conference.

For purposes of filing, the Commission's address is:

Public Service Commission  
Attn: PSC Docket No. 99-163  
861 Silver Lake Boulevard  
Cannon Building, Suite 100  
Dover, DE 19904

Service upon DP&L should be made at the following address:

Peter F. Clark, Esquire  
Randall V. Griffin, Esquire  
Counsel  
Delmarva Power & Light Company  
800 King Street  
P.O. Box 231  
Wilmington, DE 19899-0231

You may inspect copies of DP&L's proposed restructuring plan, the accompanying schedules and tariffs, and the supporting materials at the Commission's Dover office during normal business hours. Copies of such documents may also be reviewed by contacting the Division of Public Advocate, Fourth Floor, Carvel State Office Building, 820 French Street, Wilmington, DE. Please call for an appointment at (302) 577-5077. The Commission has also posted an electronic version of the plan and supporting documents to its Internet website at <http://www.state.de.us/govern/agencies/pubservc/major/major1.htm>

If you have a disability and wish to participate in these proceedings or to review the filings you should contact the Commission to discuss any auxiliary aids or services needed to facilitate your review or participation. You may contact the Commission in person, by writing, by voice telephone, or by use of the Telecommunications Relay Service ((302) 739-4333). The Commission Staff is available to answer any questions concerning this proceeding. The Commission's toll-free telephone number in Delaware is (800) 282-8574. You may also make inquiries by voice telephone at (302) 739-2107 or by Internet e-mail to [rbarua@state.de.us](mailto:rbarua@state.de.us).

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**DEPARTMENT OF  
ADMINISTRATIVE SERVICES  
MERIT EMPLOYEE RELATIONS BOARD**

**Public Notice**

**Proposed Changes to State of Delaware Merit Rules**

Please take notice that pursuant to 29 Del.C. 5914 and 29 Del.C. Chp. 101, a proposed change to Merit Rule Chapter 20 has been transmitted to the Merit Employee Relations Board of the State of Delaware from the Director of the Office of State Personnel.

The proposed change, which has been approved by the Director of the Office of State Personnel and the Statewide Labor Management Committee, will repeal the current Merit Rule Chapter 20 which is captioned "Employee Inquiries, Requests, Suggestions and Grievances" including Merit Rules No. 20.000 through 20.0420.

The repealed Chapter 20 will be replaced with a new Merit Rule Chapter 20 captioned "Grievance Procedure" and new Merit Rules No. 20.1 through 20.11 which will establish a revised procedure for filing and processing employee grievances under the Merit Rules of the State of Delaware.

The Merit Employee Relations Board will conduct a Public Hearing on the proposed change submitted by the Director on Tuesday, June 8, 1999, beginning at 9:00 a.m. in the Support Operations Training Center, 2<sup>nd</sup> Floor, 820 Silver Lake Blvd., Dover, Delaware.

The Merit Employee Relations Board will also receive and consider timely-filed written submissions from interested individuals and groups concerning the proposed new Merit Rule 20. The final date for any such written submissions is the date set forth above for the public hearing. Any such submissions should be mailed to delivered to the following address:

Merit Employee Relations Board  
Tatnall Building, Ground Floor  
150 William Penn Street  
Dover, DE 19901

Pursuant to 24 Del.C. 5914, the changes as proposed by the Director become final upon completion of the public hearing, unless rejected by a majority of the members appointed to the Board. Anyone wishing to obtain copies of the proposed changes to Merit Rule No. 20 or to present oral comments at the hearing should call Ms. Jean Lee Turner in the Merit Employee Relations Board office at (302) 739-6772.

**DIVISION OF PROFESSIONAL REGULATION  
BOARD OF PHARMACY**

The Board of Pharmacy proposes changes to Regulation V(A)(7) and V(D)(3)(c), Dispensing and Regulation VI- D, Pure Drug Regulations, and a new Regulation XIV- Administration of Injectable Medications in accord with the text that follows. The changes to Regulations V and VI require compliance with federal law and regulation and Regulation XIV is necessary to implement new statutory provisions for injections by pharmacists. A public hearing on the proposed changes will be held on June 9, 1999 at 9:00 a.m. in the third floor conference room of the Jesse Cooper Building, Room 309, Federal and Water Streets, Dover, DE 19901. The Board will also consider written comments received before June 1, 1999 by the Board of Pharmacy, Jesse Cooper Building, Room 205, Federal and Water Streets, Dover DE 19901. Following the public hearing, the Board will consider the proposed regulations at its regularly scheduled meeting immediately thereafter.

**DEPARTMENT OF EDUCATION**

The Department of Education will hold its monthly meeting on Thursday, May 20, 1999 11:00 a.m. in the Townsend Building, Dover, Delaware.

**DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES**

**DIVISION OF PUBLIC HEALTH  
OFFICE OF DRINKING WATER**

The Division of Public Health, Delaware Health and Social Services, will hold a public hearing to discuss proposed revisions to the "State of Delaware Regulations Governing Public Water Drinking Water Standards."

The Public Hearing will be held on Thursday, May 27, 1999, at 2 p.m. The Hearing will be held at the Jesse Cooper Building, Federal and Water Streets, Dover, Delaware, in the third floor conference room (Room 309).

Copies of the proposed revisions to the "State of Delaware Regulations Governing Public Drinking Water Standards" are available at the following location:

Office of Drinking Water  
Health Systems Protection  
Jesse Cooper Building  
Second Floor  
Federal and Water Streets  
Dover, Delaware

Anyone wishing to submit written comments should submit such comments no later than May 31, 1999. Please submit comments to:

Jeff Beaman  
Delaware Division of Public  
Jesse Cooper Building  
P.O. Box 637  
Dover, DE 19903

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**DIVISION OF SOCIAL SERVICES**  
**PUBLIC NOTICE**  
**Medicaid / Medical Assistance Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its eligibility manual.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to the Director, Medical Assistance Programs, Division of Social Services, P.O. Box 906, New Castle, DE 19720 by May 31, 1999.

The following changes are being promulgated:

14330.2 ELIGIBILITY FOR STATE FUNDED  
BENEFITS (NONQUALIFIED ALIENS)  
20620.2.2 NECESSARY MEDICAL CARE  
15400.3.1 Income  
16240 Composition of Budget Unit

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**DIVISION OF SOCIAL SERVICES**  
**PUBLIC NOTICE**  
**Medicaid / Medical Assistance Program**

NEW RULE:

ASSISTED LIVING MEDICAID WAIVER  
PROGRAM MANUAL

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its general policy manual.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to the Director, Medical Assistance Programs, Division of Social Services, P.O. Box 906, New Castle, DE 19720 by May 30, 1999.

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**DEPARTMENT OF INSURANCE**  
**NOTICE OF PUBLIC HEARING**

INSURANCE COMMISSIONER DONNA LEE H. WILLIAMS hereby gives notice that a PUBLIC HEARING will be held on Monday, May 24<sup>th</sup> at 9:30 a.m. in the 2<sup>nd</sup> Floor Conference Room of the Delaware Insurance Department at 841 Silver Lake Boulevard, Dover, DE 19904.

The purpose of the Hearing is to solicit comments from the insurance industry and the general public on the proposed revisions to existing Insurance Department Regulation 53, New Annuity Mortality Table for Use in Determining Reserve Liabilities for Annuities.

The hearing will be conducted in accordance with the Delaware Administrative Procedures Act, 29 Del.C. Chapter 101. Comments are being solicited from any interested party. Comments may be in writing or may be presented orally at the hearing. Written comments must be received by the Department of Insurance no later than Monday, May 17, 1999 and should be addressed to Fred A. Townsend, III, Deputy Insurance Commissioner, 841 Silver Lake Boulevard, Dover, DE 19904. Those wishing to testify or those intending to provide oral testimony must notify Fred A. Townsend, III at 302.739.4251, ext. 157 or 800.282.8611 no later than Monday, May 17, 1999.

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**DEPARTMENT OF NATURAL  
RESOURCE AND  
ENVIRONMENTAL CONTROL**  
**DIVISION OF WATER RESOURCES**

**REGISTER NOTICE**

TITLE OF THE REGULATIONS:

The Land Treatment of Sludge and Sludge Products

BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE  
AND ISSUES:

Part III, B., of the *Guidance and Regulations Governing the Land Treatment of Wastes in Delaware*, is undergoing revision. The revision will reflect changes necessary to make the State regulation consistent with the Federal regulation, Title 40 of the Code of Federal Regulations, Part 503, *Standards for the Use and Disposal of Sewage Sludge*, that have been in effect since February, 1993.

STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Delaware Code, Chapter 60 and Section 405(d) and (e) of the Federal Clean Water Act, as amended by Publication L. 95-217, Section 54(d), 91 Statute 1591 (U.S.C. 1345 9 d) and (e); and Publication L. 100-4, Title IV, Section 406 (a), (b), 101 Statute, 71, 72 (33 U.S.C. 1251 et seq.) Code of Federal Regulations, Part 503- Standards for the Use and Disposal of Sewage Sludge.

A public Hearing on the proposed regulations will be held on June 14th at 7:00 PM in the Auditorium of the Richardson and Robbins Building, 89 Kings Highway, Dover.

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